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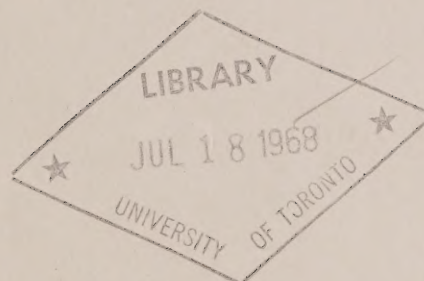
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REPORT
OF
THE COMMITTEE TO SURVEY THE
WORK AND ORGANIZATION OF THE
CANADIAN PENSION COMMISSION
VOLUME I



THE COMMITTEE TO SURVEY THE ORGANIZATION AND WORK
OF THE CANADIAN PENSION COMMISSION

ADDRESS COMMUNICATIONS TO:

THE SECRETARY,
ROOM 813,
VETERANS AFFAIRS BLDG.,
OTTAWA 4, ONT.

March 22, 1968

The Honourable Roger J. Teillet, P.C., M.P.,
Minister of Veterans Affairs,
Ottawa, Ontario.

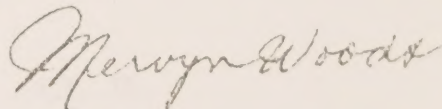
Honourable Sir:

The Committee, appointed in accordance with Treasury Board Minute T.B. 645417 of September 8th, 1965 to survey the organization and work of the Canadian Pension Commission and, though not limited in the scope of its report, to study the organization, methods and procedures used in the adjudication of disability and other pensions paid under the provisions of the Pension Act, and to study the interpretation by the Commission of such sections of the Pension Act as it deemed should be considered, submits its Report herewith in English and French.

The English text of the Report was signed by the Committee on August 25th, 1967. The Report was not delivered at that time, as you had requested that it be submitted in both English and French. The translation was done by the Department of Veterans Affairs Translator. The delivery of the French text to the Committee office commenced on December 1st, 1967 and was completed on February 13th, 1968. The final corrections were approved on February 20th, 1968. The reproduction of the French text was completed on March 10th, 1968.

The Report has been signed by all members of the Committee. A minority proposal by the Honourable Walter J. Lindal, and a supplementary comment on this proposal submitted jointly by Colonel G.A.M. Nantel and myself, are included.

Yours sincerely,



Mervyn Woods,
Chairman.

REPORT OF THE COMMITTEE TO
SURVEY THE ORGANIZATION AND WORK OF
THE CANADIAN PENSION COMMISSION
TO
THE HONOURABLE
THE MINISTER OF VETERANS AFFAIRS

Chairman:

Mr. Justice Mervyn J. Woods,
M.B.E., C.D., B.A., LL.M., J.S.D.

Members:

The Honourable Walter J. Lindel,
Q.C., B.A., LL.B.

Colonel Gerard A.M. Nantel,
C.D., Q.C., B.A., LL.B.


Secretary:

Hugh Clifford Chadderton, Esq.

VOLUME I

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REPORT OF THE COMMITTEE TO
SURVEY THE ORGANIZATION AND WORK OF
THE CANADIAN PENSION COMMISSION

PART ONE

INTRODUCTION

CHAPTER 1

INTRODUCTION

1. Establishment of Committee

The establishment of this Committee was made public in an announcement to the press media on September 16th, 1965.*

Pursuant to your proposal the Treasury Board approved the establishment of this Committee and Minute T.B. 645417 of September 8, 1965 records this approval.** The members of the Committee include Hon. Walter J. Lindal, Q.C., B.A., LL.B., and Col. G.A.M. Nantel, C.D., Q.C. B.A., LL.B., with Hon. Mr. Justice Mervyn Woods, M.B.E., C.D., B.A., LL.M., J.S.D., as Chairman. Mr. Lindal is a retired Judge of the County Court of Manitoba and a veteran of the First World War. Colonel Nantel is a career soldier serving in the office of The Judge Advocate General, a member of the Quebec Bar, a Queen's Counsel and a veteran of World War II. The Chairman is a Judge of the Saskatchewan Court of Appeal and a veteran of World War II. Mr. H.C. Chadden or, the Executive Secretary of the War Amputations of Canada, was appointed Secretary. He is also a veteran of World War II.

2. Terms of Reference

From discussions with you prior to the actual establishment of the Committee, the Chairman understood that you wanted it to be free to enquire into all phases of the operations of the Canadian Pension Commission excepting only actual rates of pension. The

* See Appendices 1 and 2 to this Chapter, pages 19 and 20

** See Appendix 3 to this Chapter, page 21

INTRODUCTION

minute of the Treasury Board referred to above sets out that:

The Board approves the appointment under the direction of the Minister for Veterans Affairs of a Committee of three persons not connected with the Department of Veterans Affairs or the Canadian Pension Commission, and for preparation of a report and recommendations thereon to the Minister within three months of the date of appointment, or as soon thereafter as possible; the Committee, though not limited in the scope of its report, to study the organization, methods and procedures used in the adjudication of disability and other pensions paid under the provisions of the Pension Act, and to study the interpretation by the Commission of such sections of the Pension Act as it deems should be considered. xxxxxx

Your Committee has taken this as its basic terms of reference and has endeavoured to interpret it with the broad approach which it understood you intended. In so doing we have given those making representations to us considerable latitude as to the areas discussed. We are pleased to report, however, that by and large those appearing have taken no advantage of this attitude. Your Committee is of the view, therefore, that all of those appearing before it have had full and satisfactory hearings.

3. Hearings

Notices were published in newspapers and veterans' publications advising of the establishment of the Committee and inviting representations. * The response exceeded all expectations. As a result your Committee held some 41 hearings occupying 31 sitting days. For the convenience of veterans' organizations, hearings were held in Toronto and Quebec City as well as in Ottawa. Those appearing included representatives of fourteen organizations of veterans and dependants, thirteen members of Parliament, The Canadian Pension Commission, The Veterans' Bureau, Canadian Forces

INTRODUCTION

Headquarters and one private individual. No one was refused a hearing and in a number of instances requests for supplementary hearings were granted.

Your Committee received more than 300 letters containing questions, recommendations, suggestions and complaints. In addition a number of organizations forwarded briefs, but did not wish to appear before the Committee.

The following is a list of the hearings.

Jan. 18, 1966	Toronto	Canadian Paraplegic Association Sir Arthur Pearson Association of the War Blind
Jan. 19, 1966	Toronto	Multiple Disability Casualty Group of the National Council of Veterans Associations
Jan. 20, 1966	Toronto	War Pensioners of Canada - Toronto Branch, War Pensioners of Canada
Jan. 21, 1966	Toronto	National Council of Veterans Assoc- iations
Jan. 22, 1966	Toronto	Toronto & District Ex-Servicemen's Advisory Committee, Hong Kong Veterans' Association of Canada.
Jan. 24, 1966	Toronto	Canadian Corps Association
Jan. 26, 1966	Ottawa	Army, Navy and Air Force Veterans in Canada *
Jan. 28, 1966	Ottawa	War Amputations of Canada **
Jan. 31, 1966	Ottawa	Royal Canadian Legion ***
Feb. 1, 1966	Ottawa	Royal Canadian Legion
Feb. 2, 1966	Ottawa	Royal Canadian Legion
Feb. 28, 1966	Ottawa	Mr. Jack McIntosh, M.P.
Mar. 1, 1966	Ottawa	Canadian Forces Headquarters

* Formerly the Army and Navy Veterans in Canada.

** Formerly the Amputations Association of the Great War.

*** Formerly the Canadian Legion of the B.E.S.L.

INTRODUCTION

Mar. 2, 1966	Ottawa	Mr. C.W. Carter, M.P.
Mar. 3, 1966	Ottawa	Mr. John Matheson, M.P.
Mar. 5, 1966	Quebec City	L'Association du 22ieme Inc.
Mar. 21, 1966	Ottawa	Canadian Pension Commission
Mar. 22, 1966	Ottawa	Mr. H.W. Herridge, M.P. Hon. Gordon Churchill, P.C., M.P. Mr. Ralph Cowan, M.P. Mr. Jack Davis, M.P.
Mar. 23, 1966	Ottawa	Mr. David Groos, M.P., Non-Pensioned Veterans Widows' Association Inc.
Mar. 24, 1966	Ottawa	Mr. F. Jack Bigg, M.P. Mr. Rene Emard, M.P.
Mar. 25, 1966	Ottawa	Canadian Pension Commission Medical Advisory Branch of Canadian Pension Commission
Apr. 13, 1966	Ottawa	Hong Kong Veterans' Association of Canada Claims Branch of the Canadian Pension Commission
Apr. 14, 1966	Ottawa	Dr. J.A. Forrester - Pension Commission
Apr. 19, 1966	Ottawa	Mr. T.M. Bell, M.P. Multiple Disability Casualty Group of the National Council of Veterans Associations
Apr. 20, 1966	Ottawa	Mr. Harold Winch, M.P. Mr. C.F. Kennedy, M.P.
Apr. 21, 1966	Ottawa	Mr. John Matheson, M.P.
May 16, 1966	Ottawa	Dr. W.C. Gibson
May 17, 1966	Ottawa	The Veterans' Bureau of the Department of Veterans Affairs
May 19, 1966	Ottawa	Director of Personnel Legal Services and Director of Industrial and Preventive Medicine, Canadian Forces Headquarters.

INTRODUCTION

May 20, 1966	Ottawa	Messrs. D.C. Decker and W.P. Power - Pension Commission Medical Advisory Branch of the Canadian Pension Commission
June 20, 1966	Ottawa	Canadian Pension Commission

Proceedings at the hearings were conducted in an orderly and formal fashion but every effort was made to allow those making representations to present their briefs and to make additional oral representations in a manner convenient and acceptable to them. Your Committee had no power to compel attendance so no special protection could be given to those appearing. Those appearing did so voluntarily and without exception were prepared to discuss fully all matters raised. While Mr. D. Gordon Blair, B.A., LL.B., B.C.L. acted as solicitor to your Committee, he attended no hearings. The members of the Committee questioned those appearing. All proceedings were transcribed but none of the persons appearing were sworn.

Most of the proceedings were conducted in English but two briefs were filed in the French language and at two of the hearings some French was used. The hearing at Quebec City is an excellent example of a proceeding conducted in both languages; a situation made possible by the cooperative attitude of all concerned. Your Committee expresses its gratitude for the polite and considerate attitude of all those appearing who were of French speaking background. This enabled the proceedings to be conducted smoothly and efficiently in spite of the fact that only one member of your Committee is fully bilingual.

INTRODUCTION

Where possible, prior to each hearing, the Secretary interviewed those intending to appear to ascertain their particular wishes and requirements and to acquaint them with what to expect when they appeared. This has served to simplify the conduct of the hearings.

4. Other Sources of Information

In addition to the information contained in briefs, letters, and information gathered from the oral representations, your Committee took other steps to equip itself for the task in hand. Committee members attended hearings of Appeal Boards of the Canadian Pension Commission at Montreal, Winnipeg, and Regina. They also attended hearings for leave to re-open at Ottawa, visited a District Office and reviewed with Mr. L.A. Mutch, the Deputy Chairman of the Canadian Pension Commission, a number of files that had gone to appeal. In addition, the physical facilities of the Commission were inspected by members of the Committee and opportunity was taken to meet the Chairman and other members of the Commission, the Medical Advisory Branch, the Claims Branch, and the Secretariat. Informal visits were also made to the Veterans' Bureau in Ottawa and to its office at Toronto.

Your Committee found that in no one place did there seem to be a complete or organized compilation of material necessary to a study of the background and history of the Canadian Pension Commission. Mr. Chadderton, the Committee Secretary, did a great deal of research and did it diligently and effectively. As a result of his capable and untiring efforts, your Committee has at hand co-ordinated information bearing on many of the problems raised for consideration.

INTRODUCTION

In addition to the above, the Secretary and his staff have reviewed many veterans' files. Many of these were examined by your Committee and from others typical problems have been brought forward for discussion. The Secretary has also had many interviews with members of the Commission and its staff for clarification of matters appearing in files and for information as to procedures.

5. Delays

Your Committee found that the first six months of its operation was taken up largely with research and familiarization, followed by extensive hearings in order to obtain information and views from interested parties. As a result, the task of evaluating this information, which often required considerable investigation regarding historical development of policies and legislation, could not commence until July. This evaluation and investigation turned out to be a time-consuming task.

It is significant that many of the problems examined by your Committee either had their source in the original Pension Act, or had been developing for some 40 years. It became apparent that recommendations for the solution of these problems could be made only after detailed examination, thorough research, and possible analysis of various approaches, and your Committee had to take the view that haste had no place in our enquiry.

6. Previous Reviews

After Confederation, the first need for military pensions arose out of the North-West Rebellion of 1885. These were dealt with by

INTRODUCTION

order-in-council. In 1901 the Militia Act made provision for service pensions to officers and men of the regular force. The extensive casualties from World War I placed new and heavy demands on pension administration, and in 1916 new and special legislation was passed establishing a Board of Pension Commissioners. In 1919 it was given exclusive authority to adjudicate on claims. While there have been some changes in this legislation at almost every session of Parliament the central purpose of the scheme then envisaged has been retained. In brief, that may be stated as adjudication by a tribunal free from political control or interference.

Although Parliamentary committees have at various times considered certain aspects of the workings of the Canadian Pension Commission, there have been but three occasions on which persons outside of Parliament have been authorized to enquire into the operations of the Pension Commission. In 1922 a Royal Commission of three members under the Chairmanship of Lieut-Col. J.L. Ralston, D.S.O., was established to investigate and report on the operations of the Pensions Board based on certain specific complaints and on general questions relating to pensions, treatment and re-establishment needs of veterans. Some ten years later a committee was established to report to the Minister of Pensions and National Health on the administration of the Pension Act. Its first Chairman was the Hon. T. Rinfret, Justice of the Supreme Court of Canada, who was later replaced by the Hon. Louis Arthur Audette, retired Judge of the Exchequer Court. Of the other ten members, five were from veterans' organizations, and five from the Department of Pensions

INTRODUCTION

and National Health and the pension administration. This committee submitted four separate reports. This was in 1933 and there has been no further overall review of the work of the Pension Commission until the present time.

7. Committee Guide-lines

(a) Financial Aspects

In its deliberations your Committee has been careful to avoid dealing with the financial aspects of pensions. Your Committee is fully aware of the responsibility of the Canadian Pension Commission to both Parliament and the taxpayer.

In considering the problems before us, there has been no endeavour to assess the overall financial commitment involved. This is not fixed, and must be decided by the Government and Parliament from time to time in light of prevailing conditions.

We have seen fit to make recommendations that would require adjustment in pension for certain classes of the severely disabled. These recommendations are associated with interpretation of the statute and required your Committee to consider the principles behind the basic rate. We have, however, avoided dealing with the actual quantum of pensions and our recommendations are made in relation to the effective rate for all pensioners.

Your Committee appreciates that change usually means increased expenditure and has been aware of the potential financial involvement inherent in our recommendations. We have not, however, considered it part of our task to advise as to how much money should be spent.

(b) Change without Upheaval

Your Committee has been guided by another basic consideration.

INTRODUCTION

The Pension Commission has over the many years since its inception developed its own way of doing things. In so far as we have been able to determine it is on the whole operating satisfactorily, and, generally speaking, has the confidence and respect of those it serves. While we are making a number of recommendations that would require some revision of its activities, we have tried to set these out in a way that will cause minimal disruption. We have tried to fit our recommendations to this pattern. This we trust will lead to minimal interference with established principles and procedures consistent with necessary or desirable changes.

(c) Administrative Detail

The members of your Committee do not qualify as efficiency experts and hence have made but limited examination of the detail of administrative operation. Our efforts have been directed to ascertaining, within our capabilities and opportunities, the effectiveness of the operations of the Commission as a means of providing veterans and members of the forces and their dependents with pensions and the attendant benefits arising from disability and death. Our inquiry has in effect started with the results of these operations and where necessary we have then endeavoured to probe the causes.

1. Constitution and Operation of the Commission

The Canadian Pension Commission has an authorized complement of seventeen Commissioners including a Chairman and a Deputy Chairman. Of these, twelve are appointed for ten year terms and five are ad hoc and appointed on an annual basis. There is a pension counsel

Introduction

and an executive assistant to the Chairman. The Secretary to the Pension Commission has charge of the Secretariat. The Claims and Review Branch is responsible for processing claims where no medical question is involved. The Chief Medical Adviser heads the Medical Advisory Branch which furnishes advice in regard to the medical aspects of pension matters. This Branch has five divisions each headed by a chief of that division. The five are: Eye, Ear, Nose and Throat; Psychiatric; General Diseases; Cardiac and Lung; and Injury and Gunshot Wound. The Commission also has eighteen District Offices in Canada and one in London, England. These are staffed by both medical and administrative personnel varying in number from some 26 in Toronto to 3 in Charlottetown.

Claims for pension are initiated at the District level where the documentation is taken and medical examination is held. The file is forwarded to Ottawa where it comes before a Pension Commissioner after review by one or more of the medical advisers. The decision of the Commissioner as to whether or not there should be entitlement is placed on the file and later, after consideration, two of his colleagues sign the finding if they agree with it. This procedure is referred to as a "Board Room" decision. The application, if refused, may be given reconsideration at what is termed either a "renewal" or "second" hearing, which constitutes a further review of the file.

There are appeals from these findings to an Appeal Board. These boards are panels of three selected from the Commission who go on itineraries for hearings at the major centres of Canada. The

INTRODUCTION

veteran may make a personal appearance and call witnesses to support his claim. He may have the assistance of counsel of his choice. In most cases, however, his case is presented by an advocate from the Veterans' Bureau of the Department of Veterans Affairs. Here, there is no opposing counsel. The members of the Appeal Board ask the questions and test the presentations as it were. Their decision is the final step in the proceeding. There are provisions for re-hearings at the Board room level and also for obtaining leave to re-open, but the above outline gives the essentials of the procedure.

9. Potential of Future Activity

It may appear that, because World War I concluded nearly 50 years ago and World War II more than 20 years ago, the adjudication of new pension claims is no longer a matter of importance. Statistics reflecting the activity of the Commission for the fiscal year ended March 31, 1965 showed a total of 3,329 applications on behalf of members of the forces who served during World War I. The total of applications on behalf of World War II personnel was 7,172, making a grand total of 10,501.

A summary of Canadian Pension Commission decisions on applications from April 1, 1964 to March 31, 1965 follows.

Nature of Applications		World War I	World War II	TOTAL
First Hearings or Initials...	Granted.....	229	1,299	1,528
	Not granted...	2,690	2,860	5,550
	Total.....	2,919	4,159	7,078
Second Hearings or Renewals...	Granted.....	16	820	836
	Not granted...	226	1,642	1,868
	Total.....	242	2,462	2,704
Others.....	Granted.....	104	447	551
	Not granted...	64	104	168
	Total.....	168	551	719
Grand Total.....		3,329	7,172	10,501

INTRODUCTION

10. Pension Activity

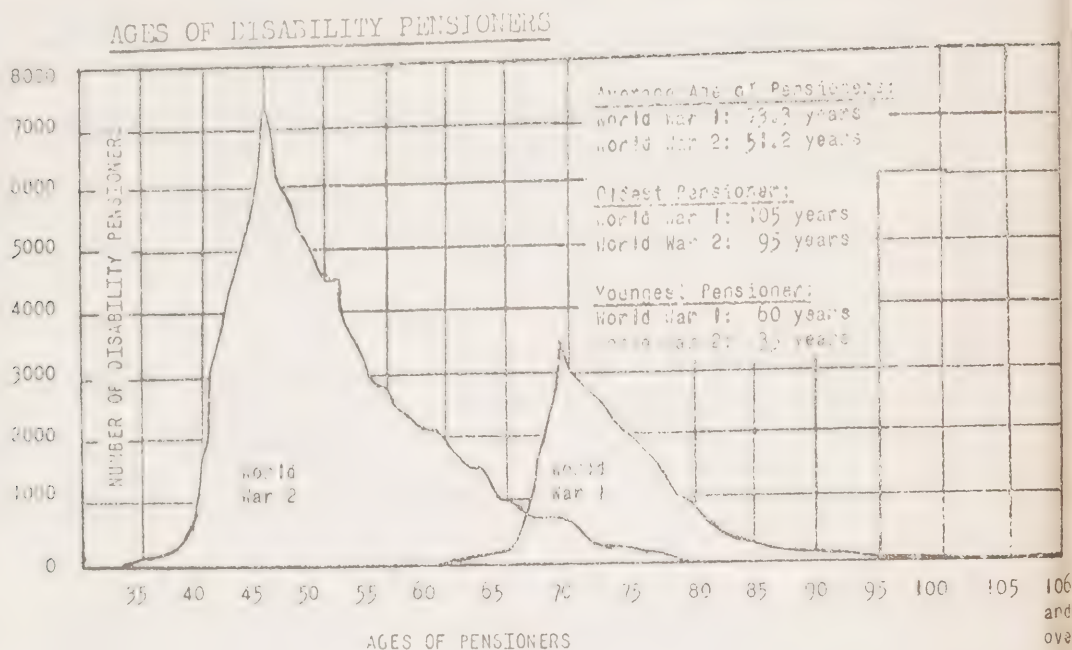
The overall activity of the Commission is shown in the following summary of pension activities during fiscal year ending March 31, 1965:²

	World War I	World War II	TOTAL
Disability Pensions--			
In force at April 1, 1964.....	38,493	106,628	145,121
Awarded during fiscal year.....	165	1,511	1,676
Reinstated during fiscal year.....	27	179	206
Totals.....	38,685	108,318	147,003
Discontinued during fiscal year...	2,482	1,699	4,181
In force at March 31, 1965.....	36,203	106,619	142,822
Dependent Pensions--			
In force at April 1, 1964.....	14,322	16,581	30,903
Awarded during fiscal year.....	565	531	1,096
Reinstated during fiscal year.....	112	614	726
Totals.....	14,998	17,726	32,724
Discontinued during fiscal year...	771	1,490	2,261
In force at March 31, 1965.....	14,227	16,236	30,463
Disability and Dependent Pensions--			
In force at April 1, 1964.....	52,814	123,209	176,023
Awarded during fiscal year.....	730	2,042	2,772
Reinstated during fiscal year.....	139	793	932
Totals.....	53,683	126,044	179,727
Discontinued during fiscal year...	3,253	2,189	5,442
In force at March 31, 1965.....	50,430	123,855	173,285

The average age of the World War I pensioner is now in the vicinity of 70, and it can be expected that the applications on behalf of this group will decline rapidly within the next ten years. The fact, however, that there is still considerable pension work being done on behalf of this World War I group is a significant indicator of the future work load for pension administration for World War II veterans. The average age for this group is now 47 years. Using this figure as a base, your Committee can foresee the need for an extensive pension administration for the World War II veterans for at least 25 years, bearing in mind the extent of the pension work still being done in 1967 for those who served during the 1914-1918 war.

INTRODUCTION

The ages of disability pensioners from World War I and II, as at March 31st, 1965, are shown below:³



The Pension Commission has also a continuing role in the adjudication and administration of pension on behalf of members of the Regular Forces who have suffered a disability or death where such is related to service. The applications handled by the Commission in respect to Regular Forces personnel in 1964-65 Fiscal Year are given in the Table below:

First Hearings	1007
Second Hearings	408
Appeal Board Hearings	290
TOTAL	1705

The fact that your Committee has, in this report, recommended significant changes in the pension legislation and in its administration is in itself a cause for some reflection. Your Committee has come to the conclusion that many of the changes which it is now suggesting should have

Introduction

been made earlier. The fact that they were not should in no way mitigate against the need to make these changes now. Where practicable your Committee has suggested that consideration be given to effect these changes retroactively.

11. Plan of the Report

In drafting this report your Committee has dealt firstly with matters of adjudication and appeals, believing that its views on needed remedies in this area should be made known before setting out other proposals. These are set out in Part II. In Part III the report deals with what your Committee has termed "Major Areas". Part IV is entitled "Miscellaneous" and deals with some individual sections of the Act together with a number of important but lesser known pension matters, the Minority Report and the supplementary comment of the Majority Members. Part V is the conclusion of the main Report.

Some of the recommendations to be found in the Report suggest changes that will involve statutory amendment. Your Committee appreciates that legislative drafting is a highly specialized field and accordingly has in almost every case been able to avoid the postulation of proposed amendments in final form. The attempt has been rather to convey as clearly as possible the results considered desirable and to leave the actual details of the drafting to be done by others. Some matters referred to do not necessitate legislative action but are intended for the guidance of those responsible for the administration of the Act.

The bulk of this report deals with areas in which your Committee found problems. These are discussed in the light of Commission policies and practices, the representations made to us, the history of the legislative provisions, your Committee's recommendations and its supporting comment.

INTRODUCTION

Your Committee found it necessary to reconstruct the historical background of many sections of the Act in order to arrive at a full understanding of their importance. It was also of value for the Committee to look at various sections from the point of view of their application in pension administration throughout the years, and to note the complaints and suggestions submitted in regard to these sections, and to analyze what remedial steps, if any, had been taken regarding their improvement.

Your Committee has considered it pertinent, in this report, to report the historical background in considerable depth. The purpose is two-fold. Firstly, this history is most important to an effective study of the provisions of the Act. Secondly, having completed the research, your Committee feels that it would be useful to place the results in your hands.

The Veterans' Benefit Act, 1951,⁴ extended the coverage of the Pension Act to members who served in the Special Forces in Korea. The Special Duty and Pension Order⁵ likewise extended the provisions of Section 13(1) to members of the Regular Forces who have served overseas in specially designated areas in peacetime.*

* Members of the Regular Forces are covered under Section 13(2) which provides pension for disability or death which arose out of or was directly connected with military service. Section 13(1), which normally is applied to service during World War I and World War II, provides pension when the injury, disease or aggravation thereof resulting in a disability or death is attributable to, or was incurred during military service. The latter provision is usually known as the "insurance principle".

Introduction

The information in this report deals specifically with applications arising from three classes of service; World War I, World War II and service in peacetime with the Regular Forces. Throughout this Report reference to service in World War II shall be taken as including service in the Special Forces in Korea and in areas designated in the Special Duty Pension Order.

Also, your Committee is aware that any revision in the Pension Act or the operating policies and practices of the Commission could necessarily affect other groups coming under legislation, including the Civilian War Pensions and Allowance Act, the Flying Accidents Compensation Order, the Royal Canadian Mounted Police Continuation act or the Royal Canadian Mounted Police Superannuation Act. Your Committee has made no detailed study of these enactments but is of the view that, in so far as possible the attitude and approach to their administration should be the same as that of the Pension Act.

REFERENCES

1. Annual Report, Canadian Pension Commission, 1964-65, Page 81.
2. Ibid, Page 80
3. Ibid, Page 80
4. SC., 1954, Chapter 65
5. Vote 58a, Schedule B, Appropriation Act No. 10, 1964.

Appendix I

News Release No. 122

For Immediate Release

Committee To Study Canadian Pension Commission

Ottawa: A survey of the organization and work of the Canadian Pension Commission will be carried out immediately, the Honourable Roger Teillet, Minister of Veterans Affairs, announced today.

A Past President of the Royal Canadian Legion, a Joint Deputy Minister of the Quebec Department of Lands and Forests, and a former Chairman of the National Employment Committee have been appointed.

Chairman of the Survey Committee will be Mr. Justice Mervyn Woods, Court of Appeal, Regina, Sask., who served in the Royal Canadian Navy throughout World War II, retiring as a lieutenant-commander, and who was Dominion President of the Legion from 1960 to 1962.

The Committee is not limited in the scope of its report, but it has been specifically instructed to study all matters relating to, firstly, the organization, methods and procedures used in the adjudication of disability and other pensions paid under the Pension Act; and, secondly, the interpretation by the Canadian Pension Commission of such sections of the Pension Act which it feels should be considered.

Members of the Committee are: Mr. Jean-Pierre Giroux, Quebec, P.Q., who served in North-west Europe in World War II in the Royal Canadian Artillery, retiring from the Militia in 1962 with the rank of brigadier, and who has been a Joint Deputy Minister of the Quebec Lands and Forests Department since 1962; and Judge W.J. Lindal, Winnipeg, Manitoba, who served as a captain in France in the Canadian Expeditionary Force of World War I and who retired in 1962 as a judge of the County and Surrogate Courts of Manitoba.

The Committee is to report to the Minister within three months or as soon as possible thereafter.

16 Sept 1965

Appendix II

News Release No. 126

For immediate release

Colonel Nantel of Montreal on Pensions Survey Committee

Ottawa - Colonel Gerard Nantel, B.A., LL.B., C.D., has been appointed to the Committee, established last September, to survey the organization and work of the Canadian Pension Commission, the Honourable Roger J. Teillet, Minister of Veterans Affairs, announced today.

Colonel Nantel replaces Brigadier Jean-Pierre Giroux who resigned from the Committee soon after it was announced, when he was appointed to the Civil Service Commission of the Province of Quebec.

Born in Montreal in 1913, Colonel Nantel was one of the first graduates of the Externat Classique de St-Sulpice in Montreal. He was admitted to the Bar of the Province of Quebec in 1938, following his graduation from the University of Montreal.

After four years of law practice in Montreal, Colonel Nantel joined the Canadian Army, attending the Officers Training School at Brockville in 1943. Upon graduation he was appointed to the legal branch of the armed forces, and since then has held many appointments in Canada and overseas in that branch. He attained the rank of Colonel in 1962 and is at present Assistant Judge Advocate General, H.Q. Quebec Command.

Colonel Nantel brings a wealth of military and legal experience to the Committee, the chairman of which is Mr. Justice Mervyn Woods, Court of Appeal, Regina, Sask., and the Honourable W.J. Lindal, Q.C., Winnipeg, Manitoba, retired Judge of County and Surrogate Courts, is the third member.

22 December 1965

APPENDIX III

EXTRACT FROM THE MINUTES OF A MEETING OF THE HONOURABLE THE
TREASURY BOARD, HELD AT OTTAWA, ON SEPTEMBER 8, 1965.

T.B. 645417

VETERANS AFFAIRS

The Board approves the appointment under the direction of the Minister for Veterans Affairs of a committee of three persons not connected with the Department of Veterans Affairs or the Canadian Pension Commission for a survey of the organization and work of the Canadian Pension Commission and for preparation of a report and recommendations thereon to the Minister within three months of the date of appointment, or as soon thereafter as possible; the Committee, though not limited in the scope of its report, to study the organization, methods and procedures used in the adjudication of disability and other pensions paid under the provisions of the Pension Act, and to study the interpretation by the Commission of such sections of the Pension Act as it deems should be considered; committee members to be paid \$100 per day expense allowance while acting on the Committee plus travelling expenses and to be supplied with necessary support staffs; the study to be chargeable at an estimated cost of \$40,000, to available funds in Vote 20, Canadian Pension Commission - Administration.

Sgd.. H.A. Davis

Assistant Secretary

APPENDIX IVNOTICETHE COMMITTEE TO SURVEY THE ORGANIZATION AND WORK
OF THE CANADIAN PENSION COMMISSION

The Minister of Veterans Affairs has appointed a Committee of three private citizens to survey the work of the Canadian Pension Commission, and its administration of the PENSION ACT, under which pension is provided for disability and death to or in respect of members of the Canadian Naval, Army and Air Forces.

The terms of reference of the COMMITTEE are to survey the organization and work of the Commission and, without limiting the scope of its report, to study the organization, methods and procedures used in the adjudication of disability and other pensions paid under the provisions of the Pension Act, and to study the interpretations by the Commission of such sections of the Pension Act as it deems should be considered.

The COMMITTEE invites representations in writing concerning the work of the Canadian Pension Commission from:

- (1) Veterans' organizations;
- (2) Other interested bodies; and
- (3) Private individuals.

These representations will be reviewed by the COMMITTEE and, where considered desirable, the COMMITTEE will receive representatives or private individuals at sessions to be arranged. The COMMITTEE assumes no responsibility for expense incurred for attendance at such sessions.

Representations must be submitted in writing not later than December 6th, 1965, to:

H.C. Chadderton,
Secretary,
The Committee to Survey the Canadian
Pension Commission,
Room 5116,
Veterans Affairs Building,
OTTAWA 4, Ontario.

The COMMITTEE is anxious to have the views and opinions of all who may be concerned in this vital matter. The co-operation of interested organizations and persons will be greatly appreciated, and it is hoped that they will avail themselves of this opportunity to assist the COMMITTEE.

Mervyn Woods,
Chairman,
The Committee to Survey
the Canadian Pension
Commission.

OTTAWA, Canada,
October 17th, 1965.

REPORT OF THE COMMITTEE TO
SURVEY THE ORGANIZATION AND WORK OF
THE CANADIAN PENSION COMMISSION

PART TWO

ADJUDICATION AND APPEALS

CHAPTER 2INTERPRETATION POWERSGENERAL

Interpretation of the Pension Act is the responsibility of the Pension Commission, as provided by Section 5(5) of the statute which reads as follows:

- 5(5) The Commission shall determine any question of interpretation of this Act and the decision of the Commission on any such question is final.

REPRESENTATIONS AND EVIDENCE

In general, the use made by the Pension Commission of this Section of the Act was widely criticized. Veterans organizations considered that the powers accorded the Commission under this Section were excessive and that, because of the existence of these powers, the Commission has developed a bureaucratic attitude with the result that:

- (1) The Commission made no attempt to justify its actions.
- (2) The Commission viewed the powers under Section 5(5) as a "carte blanche" to deal with each case as it saw fit.
- (3) There was no attempt to obtain, collate or publish data covering past decisions relating to interpretation in such manner as to create a ready reference for future use.
- (4) The Commission considered it unnecessary to publish policy directives which would be available in the form of consolidated regulations for distribution to veterans organizations, the Armed Forces, the Veterans' Bureau, or even on any regular basis to the Commission's own staff.

Mr. T.D. Anderson, Chairman of the Pension Commission,

told your Committee that individual Commissioners were permitted to use their own interpretation regarding provisions of

REPRESENTATIONS AND EVIDENCE

the Pension Act. Your Committee inferred that, in this respect, the Chairman was referring to circumstances other than those where the Pension Commission had issued a directive, giving an official interpretation.

The Pension Commission followed the practice of deciding on matters of interpretation either at full meetings of the Commission, or at what is known as a "Committee of Interpretation".

The procedure of these Committees of Interpretation would seem to be as follows:

1. Requests for interpretation are submitted to the Commission Chairman from time to time by individual Commissioners.
2. The Commission Chairman then delegates several members of the Commission to sit at a Committee of Interpretation, and to prepare a report for the Commission.
3. The Pension Commission accepts, amends, or rejects the recommendation of the Committee. If the recommendation is accepted, the Commission would issue a written directive setting out the interpretation as official Commission policy.

Your Committee noted some instances where the Chief Pensions Advocate of the Department of Veterans Affairs, or representatives of veterans organizations, had submitted requests to the Commission Chairman for an interpretation of the Act, with the result that such persons had appeared before Committees of Interpretation to make submission supporting a particular interpretation.

HISTORY

The following excerpt is given from the annotation to the Pension Act, 1919 in respect of Section 7 quoted above. ⁴

This section continues the Commission in its former position of independence so far as pensions are concerned. The decisions rendered cannot be questioned by any higher authority.

This authority of the Commission was amended in 1923. Section 1923 7(1) is quoted in part as follows: ⁵

7(1) ...There shall be an appeal from any decision of the Commission to the Federal Appeal Board as herein provided, pursuant to the rules and regulations established by the Governor-in-Council under the authority of the Act.

The following excerpt is taken from the annotation to the Bill amending the Pension Act, 1923: ⁶

This section cancels the Commission's powers to have jurisdiction over all pension matters and as to entitlement to the Pension for disability or death establishes a right of appeal to a Federal Appeal Board.

A further amendment in respect of the jurisdiction for interpretation of the Pension Act was contained in Section 51(8) of the Act, approved under date of June 11, 1928 which read as follows: ⁷ 1928

51(8): Any dispute as to the jurisdiction of the Board * to entertain and determine appeals from refusal of pension by the Commission shall be referred by the Department to the Exchequer Court for determination.

The amendment of 1928 was presumably enacted to resolve conflicts of jurisdiction between the Board of Pension Commissioners, and the Federal Appeal Board. In all other matters of interpretation, the Board of Pension Commissioners continued to submit questions of interpretation for an opinion from the Department of Justice.

* Refers to Federal Appeal Board

HISTORY

The first legislative provision vesting jurisdiction in a pension adjudicating body with respect to interpretation, appeared in an amendment to the Pension Act of May 30th, 1930,⁸ which stated, in effect, that the Pension Appeal Court could question any decision which turned upon "the interpretation of any provision of this Act". The effect of this amendment was that the Pension Appeal Court was used to decide on matters of interpretation with respect to decisions of the Pension Tribunal. The Board of Pension Commissioners still continued to use the Department of Justice for opinions on broad questions of interpretation.

1930

An amendment dated May 23rd, 1933 stated: 9

65(1)(c): The Court shall have jurisdiction in respect of the following matters:

- (c) Any question of interpretation of this Act which may be referred by the Crown, or by leave of the Court, submitted by the applicant and the procedure on such reference or submission shall be prescribed the Court.

This was taken to mean that, as of this date, jurisdiction rested with the Pension Appeal Court to deal with "any questions of interpretation."

Under date of June 12, 1936, a further amendment was made in respect of the jurisdiction of the Commission. Paragraph Section 5(1) is quoted, in part, hereunder: ¹⁰

1936

HISTORY

5(1): Subject to the provisions of this Act and any regulations made thereunder, the Commission shall have full and unrestricted power and authority and exclusive jurisdiction to deal with and adjudicate upon all matters and questions relating to the award, increase, decrease, suspension or cancellation of any pension under this Act.

The explanatory note in connection with Bill 26 which dealt with this amendment stated as follows: ¹¹

There is no change from the present Section 5 in the Act except that (sic) the addition of the underlined words which make it a little more definite that the Commission has unrestricted power and jurisdiction.

It is noted, however, that the former Section 65(c) remained in the amended Act of 1936 which provided that questions of interpretation could be referred to the Pension Appeal Court. The Pension Appeal Court was abolished by an amendment of the Act on May 4th, 1939.

The duties of the Pension Appeal Court with respect to appeals were transferred to Appeal Boards of the Commission. There was, however, no specific reference in the new legislation to the procedure for deciding questions of interpretation of the Act.

This situation was altered by an amendment to the Pension Act under date of May 28, 1941, which saw approval of Section 5(3) which read as follows: ¹²

1941

5(3): The Commission shall determine any question of interpretation of this Act and the decision of the Commission on any such question shall be final.

HISTORY

The explanatory note accompanying the Bill as presented to Parliament read as follows: ¹³

This is a new Subsection and is inserted for the purpose of making it clear that the Commission is the sole authority on questions of interpretation.

This authority exists, in the same wording, in the Act at this time under Section 5(5).

It would appear from this review that, over the years, Parliament has favoured a policy under which the responsibility for interpretation of the legislation should be left with the administrators.

In 1928, at which time there was both a Board of Pension Commissioners as a court of first instance, and a Federal Appeal Board as a court of final resort, matters of interpretation were referred to the Exchequer Court.

In 1930, the final responsibility for interpretation of the provisions of the Act was vested in the Pension Appeal Court. This situation continued until the Pension Appeal Court was abolished in 1939.

With the removal of the Pension Appeal Court some question arose as to whether or not the Commission was the sole interpreter of the Act. Under Sub-section 5(1), as enacted on June 12, 1936, the Commission was given "full and unrestricted power and authority and exclusive jurisdiction" to deal with pensions. There was, however, no specific reference to the responsibility for interpretation. This situation was clarified by the amendment of 1941 which gave the Commission sole and final responsibility for interpretation.

INTERPRETATION POWERSREFERENCES

1. Proceedings of Committee Sessions, Volume IV, Page R-23.
2. SC. 1941, C.23, Assented to June 14, 1941.
3. SC. 1919, C.43, Assented to July 7, 1919.
4. Pension Act with Annotations, July 1, 1919, Page 9.
5. SC. 1923, C.62 (Sec. 7(1)) Assented to June 30, 1923.
6. BILL 205, as approved by House of Commons, June 13, 1923.
7. SC. 1928, C.38, Assented to June 11, 1928.
8. SC. 1930, C.35 s.14, Assented to May 30, 1930.
9. SC. 1933, C.45 s.15, Assented to May 23, 1933.
10. SC. 1936, C.44 s. 5, Assented to June 23, 1936.
11. BILL 26, as approved by House of Commons, June 12, 1936.
12. SC. 1941, C.23, s. 4, Assented to June 14, 1941.
13. BILL 17, as approved by House of Commons, May 28, 1941.

PERSONAL APPEARANCESGENERAL

Personal appearances in matters of assessment, degree of aggravation and other discretionary benefits. Appeals in matters of this nature are dealt with under Section 7(3) which reads as follows:

- 7(3) The Commission, represented by one or more Commissioners designated by the Chairman, may in its discretion hold sittings in any part of Canada, or elsewhere than in Canada, for the purpose of hearing evidence or complaints in respect of pensions or any question of assessments, and, if directed by the Chairman, different sittings of the Commission may be held at the same time.

REPRESENTATIONS AND EVIDENCE

The Royal Canadian Legion suggested to your Committee that the basis on which the Pension Commission granted personal appearances under this authority in the Act was too restrictive.² Other representations made to the Committee stated that:

- (1) The Commission appeared to be reluctant to grant personal appearances under sub-section 7(3) of the Act.
- (2) The Commission has not issued a published policy setting out the circumstances under which such personal appearances would be granted.
- (3) The arrangements for such personal appearances were open to criticism on the grounds that:
 - (a) No provision was made for presentation of argument by the veteran's advocate or counsel representing the applicant;
 - (b) No record of evidence was maintained;

Mr. Ralph Cowan, M.P.: Your Committee heard a representation from Mr. Cowan concerning the lack of appeal provisions in regard to those sections of the Act which deal with matters other than entitlement. He stated: ²

Representations and Evidence

The existing appeal procedure deals only with applications for entitlement, i.e. whether or not the applicant is entitled to pension (as separate and apart from the assessment of the degree of disability which establishes the amount of money the pensioner will receive). There are a considerable number of provisions in the Pension Act from which there is no appeal, and, in effect, the decision of the Commission is final, with no opportunity for the applicant to appear in person, or for an application to support an appeal.

Veterans' Bureau: The submission from the Veterans' Bureau³ suggested that hearings under Section 7(3) could reasonably be used to permit consideration of more requests in connection with pension matters. The submission contained a memorandum to the Chairman of the Pension Commission from the Chief Pensions Advocate dated March 26, 1962 and a memorandum to the Departmental Secretary dated December 30, 1963. These documents recommended the right of appeal and right of hearing in regard to a number of matters where no such provisions were now available under the procedure of the Commission. These matters included:

- (1) Administration of a pension by the Commission. (Section 18)
- (2) Suspension of a pension by the Commission on a pensioner's imprisonment. (Section 19)
- (3) The disposition of unclaimed installments. (Section 24(2))
- (4) Payment of last illness and burial expenses. (Section 24(5))
- (5) Awards of compassionate pension. (Section 25)
- (6) Suspension of pension on failure to appear for a medical examination. (Section 29(1))
- (7) The award of Attendance Allowance. (Section 30(1))

REPRESENTATIONS AND EVIDENCE

- (8) Retroactive dating of an award of a pension.
(Section 31)
- (9) The reduction of pension on refusal of a pensioner to undergo medical or surgical treatment.
(Section 32)
- (10) Award of pension where a pensioner is separated from his wife. (Section 34(1))
- (11) Allowance for maintenance of parents of a pensioner. (Section 34(2))
- (12) The right of a widow to pension where separation, divorce, and common-law relationships are involved.
(Section 34 (6) and Section 36)
- (13) Claim of dependent parents in respect to deceased members of the Forces. (Section 38)
- (14) Claim of dependent brothers and sisters in respect to deceased members of the Forces.
(Section 39)
- (15) Apportionment of pension between several applicants. (Sections 40 and 41)
- (16) Retroactive provisions in death claims.
(Section 42).

Procedure of the Commission

Personal appearances under Section 7(3) of the Pension Act are approved by the Deputy Chairman of the Commission, on authority delegated from the Chairman.

Requests for appearances under Section 7(3) are submitted to the Deputy Chairman through:

- (1) The Pensions Medical Examiner in a District Office;

REPRESENTATIONS AND EVIDENCE

- (2) The Chief Pensions Advocate, either on referral from a District Pensions Advocate or at the request of a member of the Head Office staff of the Veterans' Bureau; or
- (3) Veterans organizations.

These appearances may be made before one or more Commissioners.

The general practice is to authorize these appearances before three Commissioners, usually when such are travelling as the members of an Appeal Board. This means that such members handle Section 7(3) personal appearances in conjunction with their itineraries while considering entitlement appeals under the regular procedure.

When a Section 7(3) appearance is authorized, the Commissioners designated to hear the complaint are provided with a summary of information which is prepared by either the Veterans Bureau or the Medical Advisory Branch, in accordance with the following division of responsibility:

- (1) The Veterans' Bureau prepares a summary of evidence for the purpose of a personal appearance to consider a degree of aggravation. Such summary of evidence is the responsibility of the Veterans' Bureau, in that the main factors usually involve evidence with respect to attributability to service.
- (2) The Medical Advisory Branch of the Commission prepares a summary of information where the personal appearance is for the purpose of considering an assessment of disability. Such summaries are medical in nature.

In Section 7(3) appearances, the Commission pays the expense of the pensioner and witnesses, provided that the complaint is resolved in favour of the pensioner.

REPRESENTATIONS AND EVIDENCE

The decision on a complaint submitted at a personal appearance is normally made by the Commissioners who hear the complaint. In cases of disagreement among the Commissioners, the matter is referred to a regular meeting of the Commission for decision. This procedure is set out in a directive issued by the Deputy Chairman under date of December 3rd. This directive cautions that:

- (1) personal appearances are not to be considered as "hearings"; and
- (2) Section 7(3) of the Act provides only for a "sitting" to take evidence, but as a matter of Commission policy, it has been the practice of the designated Commissioners to render a decision, except that where there is a disagreement among the other members, the matter will be referred to the Commission for decision.

Purpose of 7(3) Appearances

Section 7(3) of the Act states that the Commission, represented by one or more Commissioners, may hold sittings "for the purpose of hearing evidence or complaints in respect of pensions or any questions of assessment". Information given to your Committee gives rise to the question as to whether or not the Pension Commission has utilized Section 7(3) appearances to the full extent as contemplated by the legislation.

The Commission Chairman in his evidence before this Committee on March 2nd, 1968, stated that 7(3) appearances were restricted generally to questions: (a) medical assessment, or (b) degree of

REPRESENTATIONS AND EVIDENCE

Confirmation regarding the restricted use of this procedure appears to be inherent in the fact that, during the 1965-66 fiscal year, the total number of Section 7(3) personal appearances was only 164, of which 110 dealt with complaints regarding assessment of medical disability. The remainder dealt with matters such as the degree of aggravation and retroactivity.

The Act would seem to permit a personal appearance under this Section in regard to any complaint in respect of pension. The statistical data for the 1965 fiscal year indicates that the Pension Commission has made use of this procedure mostly to deal with complaints in regard to assessment and even then only on a restricted basis.

It is evident that the Pension Commission has not interpreted this section to include other discretionary matters where pension entitlement has been granted, but where the pensioner or his dependant has a complaint. Examples are:

- (1) Administration of pension where the pensioner is deemed to be incapable of handling his own monies;
- (2) Request for payment of an instalment of pension which has been unclaimed;
- (3) Award for maintenance of parents; and
- (4) Allowance for a wife who is separated from a pensioner.

Your Committee is interested also in the observation⁶ that the Pension Commission has limited the use of 7(3) appearances to complaints in respect to pensions, and in so doing is giving a very limited inter-

REPRESENTATIONS AND EVIDENCE

pretation to the words of the section which state: "complaints in respect of pensions".

The result of this restricted interpretation is that the Pension Commission will permit proceedings under Section 7(3) only when the complaint is made by a person who is already in receipt of a pension. By this limitation, the Pension Commission appears to prohibit the use of Section 7(3) in connection with dependent parents pension, a claim by a widow separated prior to death of pensioner who has been denied pension under Section 36(5) or other discretionary matters under the Act in which a non-pensioner is involved.

HISTORY

The provision for personal appearances before designated members of the Commission was enacted in an amendment to the Pension Act under date of May 23rd, 1933 in the following form: 7

1933

The Commission, represented by one or more Commissioners, may in its discretion hold sittings in any part of Canada for the purpose of hearing evidence, or complaints in respect to pension or any question of assessment.

This provision in the Act remains unchanged, except for subsequent amendments of a minor nature which provide for sittings outside of Canada, and for different sittings to be held at the same time.

The explanatory note to the Bill resulting in this provision reads as follows: 8

This is a recommendation of the Committee on the administration of the Pension Act.

The Committee to which reference is made in the above annotation was entitled "THE COMMITTEE APPOINTED TO INVESTIGATE INTO THE ADMINISTRATION OF THE PENSION ACT". 9 The recommendation to which the annotation referred was included in a section of this Committee's report written by Brigadier-General Alex Ross, representative of the Canadian Legion * who was the spokesman for veterans organizations.

The relevant recommendation from this Report is set out hereunder: 10

* This report was endorsed by Richard Myers, representing the Amputations Association of the Great War; Frank J.G. McDonagh representing the War Pensioners of Canada, and W.C.H. Wood, representing the Army and Navy Veterans.

HISTORY

(D) Assessment Appeals.
Recommendation No. 12.

We have had considerable evidence on the matter of assessment appeals, and opinions expressed were varied. The preponderance of evidence is in favour of some system of appeal. The danger has been pointed out, however, that such right of appeal would cause an influx of applications which would be very adverse to the operation of any re-constituted administrative machine. There is this danger, but I cannot too strongly stress the fact that some improvement in the existing machinery is necessary. So long as the Board of Pension Commissioners is the final authority in matters of assessment, they are bound to be subjected to criticism and criticism is undoubtedly one of the features which tend to prevent the smooth operation of an organization. However, having regard to the fact that the 1930 legislation was imperilled by the accumulation of work which has been thrown upon it, I am loathe at this time to suggest setting up the right of appeal on assessment. The Chairman of the Board of Pension Commissioners informs us, that when they have been able to personally interview applicants for review they have found no difficulty in effecting adjustments. With the increased personnel which will be available if the recommendations submitted are put into effect, it should be possible for the Board to grant personal interviews to every applicant regarding his assessment and I think, therefore, that this system should be tried rather than the setting up of a new quorum.

It would appear that the recommendation in this Report desired to bring about a procedure which would make it possible for the Board of Pension Commissioners to grant personal interviews to complainants who requested an adjustment in pension.

HISTORY

A system for Section 7(3) appearances has been instituted in accordance with the intent of the recommendation of the 1932-33 Investigating Committee. There is some question, however, as to whether the system as it now operates gives sufficient scope to permit effective reconsideration where a pensioner is dissatisfied with his medical assessment, or with some other matter of pension once entitlement has been granted.

COMMITTEE RECOMMENDATIONS

(6) That, under the existing authority of Section 7(3) of the Pension Act, the Pension Commission establish a system of personal hearings whereby the Commission can hear formal complaints from individuals in respect of all matters other than entitlement with the following stipulations:

- (a) The responsibility for granting authority for such personal hearings remain that of the Commission Chairman.
- (b) Personal hearings be granted on a more liberal basis than has been the practice in the past in regard to Section 7(3) personal appearances.
- (c) The procedure be as simple as possible and arrangements be made for such hearings to be held at frequent intervals in all Districts.
- (d) All evidence be taken under oath, and a record be kept. All oral evidence shall be taken by court reporter, reporting equipment or other effective means.
(See Recommendation No. 14 (M), page 30 hereof)
- (e) Frequent use be made of the authority to conduct these hearings by one Commissioner.
- (f) The decision in regard to complaints considered at such hearings be made by a quorum of the Commissioners where more than one Commissioner forms the body to hear the complaint, with the provision that Commissioners have the power to refer the matter to the Commission for decision should they so desire; and, where the complaint has been heard by a single Commissioner, the decision be made by the Commission on the basis of a written report from such Commissioner.

Personal
HearingResponsibility
of ChairmanHearings
To Be
ExpandedInformal
ProcedureEvidence
Under Oath
On RecordOne
CommissionerDecision
by Quorum

(7) That an appropriate application form be used where a person requests a personal hearing under Section 7(3). This application form should be signed by the applicant, and then be

Applicant
Procedure

COMMITTEE RECOMMENDATIONS

submitted to the Commission Chairman through any responsible source including:

- (a) District Offices of the Commission
- (b) The Veterans' Bureau
- (c) Veterans organizations

The application form should be supported by written argument, to be prepared by the applicant or his sponsoring agent. If authority for a personal hearing is approved, the hearing should be proceeded with expeditiously.

If the application is refused, the applicant and the sponsoring agent should be informed of the reason for such refusal in writing. Following refusal, the applicant should have the right to apply for permission to appeal to the appellate body proposed by this Committee in accordance with Recommendation No. 14 of this Report (See Chap. 4, page 77)

- (8) That the Commission publish a directive governing Section Directive
7(3) personal hearings in accordance with Recommendation No.
96 of this Report. (Volume III, Chapter 23, page 852)

- (9) That an individual who appears before one or more Commission- Applicant's
ers under the authority of Section 7(3), and witnesses who Cost
appear on his behalf, may be paid the cost of transportation
and be re-imbursed for expenses in the same manner as applic-
ants and witnesses appearing before an Appeal Board (proposed
Entitlement Board) of the Commission.

- (10) That this subsection be removed from the "organizational Part of
section" of the Act and be placed in sequence with the Adjudication
sections which would be re- Process
posed appellate body.

COMMENT

The existing procedure for Section 7(3) personal appearances represents the final resort in matters of assessment and degree of aggravation and in discretionary awards. At most there is but one hearing and the applicant has no recourse beyond the Pension Commission itself.

In view of the potentially large number of complaints which could be submitted under this section of the Act, and in many instances their relative simplicity, your Committee considers that more use should be made of sittings conducted by one Commissioner.

The Committee feels, however, that there should be a form of appeal from the decisions of Section 7(3) hearings, and that such appeal should lie to the Pension Appeal Board, as proposed in accordance with Recommendation No. 14. (See Chapter 4, page 77.)

A simplified procedure should exist to handle 7(3) personal appearances so as to ensure that adequate means are available for a hearing, including attendance by the applicant and supporting witnesses. A personal appearance of this type should be granted after the Commission has exhausted the normal procedures for reconsideration (including at least one renewal application), and where the Chairman concludes that such appearance would either:

1. Furnish additional information on which a decision could be made; or
2. Indicate that a more favourable decision cannot be granted under the Pension Commission's interpretation of the legislation.

COMMENT

This simplified procedure would be available to provide a personal hearing in regard to any matter under the Pension Act, except an entitlement claim. These hearings could be conducted in an informal, yet effective manner and would do much to allay criticism that the Commission uses its final powers of determination in these discretionary matters, without providing the applicant recourse to appeal.

Under the present procedure, Section 7(3) personal appearances are granted only where a pensioner is directly involved. This has the effect of ruling out personal appearances under this Section of the Act in a great many areas including a request for consideration for dependent parents and non-pensioned widows.

Your Committee's proposal is that personal appearances should be granted on a more liberal basis in regard to those areas where the Pension Commission now uses the provisions of Section 7(3) of the Act, and, in addition, the Pension Commission should allow such personal appearances to deal with those other matters which involve complaints from persons not in receipt of pension, but who appear to have justifiable grounds for a hearing before one or more Commissioners.

Your Committee suggests that the extended use of Section 1(3) hearings would provide a means of appeal within the Commission itself, such to be augmented by the possibility of further appeal on these matters to the proposed Pension Appeal Board.

COMMENT

Entitlement claims would not be the subject of Section 7(3) hearings, and would continue to be the responsibility of the Appeal Boards (proposed Entitlement Boards), with provision for final appeal to the Pension Appeal Board.

The adoption of this Committee's recommendation that the existing procedure for Section 7(3) personal appearances be expanded could well increase the work load of the Commission. Your Committee has recommended in this Report that the Commissioners should be relieved of much of the present task of handling routine decisions including burial grants, authority for pensions to be placed under administration, apportionment of pension, etc. This would leave the Commissioners free to handle the additional responsibility proposed in regard to the expansion of Section 7(3) personal appearances. The use of single Commissioners for Section 7(3) hearings would also help to keep the workload to a minimum.

Payment of Witnesses

Under the existing Act, there is no provision for the payment of expenses of an applicant or witnesses appearing before one or more Commissioners under authority of Section 7(3) of the Act. It has been the usual policy of the Commission to pay the expenses of a pensioner and witnesses only if the complaint is resolved in favour of the pensioner. Your Committee considers that the lack of provision under which expenses may be paid, regardless of the outcome of a personal appearance under this Section of the Act, has considerably reduced the effectiveness

COMMENT

of the procedure as intended in the legislation. That is to say, an applicant who is offered an opportunity to make a personal appearance under this Section of the Act might have some reservations about taking advantage of such opportunity, when it became known to him that he could not claim for reimbursement of expenses if the Commission turned down the request under consideration at the hearing.

It is assumed that the policy under which expenses are paid only where the pensioner has been successful in the purpose of his personal appearance was instituted in order to eliminate frivolous applications for personal appearances under this Section of the Act. Your Committee does not feel that any such provision is necessary, particularly in view of the practice followed by the Commission, which is to the effect that personal appearances may be granted on authority of the Chairman, as delegated to the Deputy Chairman. Your Committee's recommendation is that the responsibility for granting authority for such personal appearances remain as at present. This provision should be sufficient to ensure that abuses of the proposed procedure for personal hearings are kept to a minimum.

Accordingly, it seems only fair that an applicant who is granted a personal appearance for the purpose of assisting the Commission to make a decision on a claim for pension benefits should be entitled to have his expenses paid, together with those of his witnesses, regardless of the outcome of the hearing.

COMMENT

It is the view of your Committee that the effectiveness of this section of the Act has suffered by reason of the fact that its inclusion in the organization section in the Act had mitigated against the section being considered as a proper form of appeal. Notwithstanding, the intent of the legislators appear to be evident in the fact that this section was adopted at the suggestion of the Special Committee of 1932/33, to provide a means of review in regard to matters of assessment. Hence, this section should take its rightful place as part of the proper appeal procedure.

PERSONAL APPEARANCES

1. Proceedings of Committee Sessions, Volume III, page L-75
2. Ibid, Volume V, page U-4 (Mr. Ralph Cowan, M.P.)
3. Ibid, Volume VI, page KK-131
4. Memorandum, dated December 3rd, 1963, to Chairman and Commissioners from Mr. L.A. Mutch, Deputy Chairman, Canadian Pension Commission
5. Proceedings of Committee Sessions, Volume IV, page R-31
6. Ibid, Volume VI, pages KK-131 to KK-135
7. C. 1932, C. 15, assented to May 23rd, 1933
8. Bill 78, as approved by the House of Commons, May 12th, 1933.
9. Committee appointed pursuant to order in Council, PC 1741, of August 4th, 1932
10. Report of the Committee Appointed to Investigate into the Administration of the Pension Act, 1932-33, page 38.

CHAPTER 4

GENERAL

Appeals in regard to applications for entitlement to a basic award of pension are decided by Appeal Boards of the Pension Commission. The authority for Appeal Boards is set out in Section 62 as follows:

- (1) For the purpose of hearing applications, Appeal Boards of the Commission, each consisting of three members, shall hold sittings at convenient places throughout Canada.
- (2) Such Appeal Boards shall sit at such places and on such days and shall consist of such members of the Commission as may be determined by the Chairman of the Commission.
- (3) Public Hearings of applications by an Appeal Board of the Commission shall be conducted in accordance with the rules of procedure made under this Act.
- (4) At the request of the applicant, an Appeal Board of the Commission may direct any application to be heard in private if it considers that a public hearing might be disadvantageous and that a hearing in private would not be contrary to the public interest.
- (5) No member of an Appeal Board of the Commission shall adjudicate upon any case coming before an Appeal Board pursuant to subsection (6) of Section 59, if such member has previously sat as a member of the Commission at either first or second hearing of such case, except that such member may adjudicate upon any case in which the applicant's consent thereto has first been obtained.

REPRESENTATIONS AND EVIDENCE

The chief criticism of the present appeal procedure arises from the use of Appeal Boards made up of members of the Pension Commission, and hence, it does not represent a proper judicial system of appeals. This criticism is based on the fact that Commissioners, while sitting as members of an Appeal Board, are required to pass judgment on decisions made previously by their own colleagues, and on occasion by one of the members of the Board hearing the appeal.

Representations and Evidence

The National Council of Veteran Associations¹ advanced two objections in regard to the composition of Appeal Boards, as follows:

(a) The Commission is the administrator of the Pension Act and as such, is responsible for all administrative and financial transactions. The members of an Appeal Board should not, therefore, be drawn from the members of the same body which is responsible for administration of the Act.

(b) The Commission is a relatively small, and compact group of individuals and the members are necessarily closely associated in their daily work in the Commission. Accordingly, the Commission cannot be compared with the judicial system of Canada, which is broad in scope and consists of considerably more personnel.

The position of the Royal Canadian Legion relative to an independent appeal procedure was the subject of careful study by your Committee. The Legion had established a special committee to bring in a report to its 1960 Biennial Convention regarding the question of whether or not provision should be made in the Pension Act to refer appeals to the Supreme Court of Canada and/or to Provincial Courts. The Legion adopted this report, which was subsequently submitted to the Standing Committee on Veterans Affairs at the 1963 Session of Parliament.² This Report concluded that:

The present legislation and procedure is basically sound and the establishment of an appeal board would not serve to advance the interest of veterans.

This recommendation was based on the assumption that:

The Commission would make use of Section 8 of the Pension Act to make regulations in respect of procedures; and

Proper use would be made by the Commission of the "Benefit of Doubt" clause set out in Section 70 of the Pension Act.

Representations and Evidence

The Legion officials suggested to the Parliamentary Committee that "the interpretation of Section 70 (of the Pension Act) appears to be the crux of perhaps more than 90% of the problems arising in adjudication claims".³

In the submission to this Committee⁴ the Legion appeared to indicate a continuing dissatisfaction with the decisions of the Commission and the following statements are quoted:

It will, however, be quite evident that despite this cordial relationship we are far apart in our views in several aspects of the Commission's interpretation of the legislation, and their steadfast refusal to accept decisions, especially those at appeal, of precedents.⁵

The Royal Canadian Legion submits that the Pension Act is, with a few minor exceptions, basically fair and adequate. There is room for some improvements in the procedure being followed, particularly in consideration of claims in the initial stages and in the composition of Appeal Boards. The major problem is and has been the interpretation of application of Section 70 of the Act.⁶

The Legion stated further that in its opinion the Pension Commission was not providing the benefits of Section 70 (Benefit of the Doubt) as intended by the legislators, and that there was "a great divergence of opinion in interpreting this Section".

While the Legion aired complaints similar to those of other groups its suggested remedy centered in devising some means of bringing about a change of attitude on the part of the Pension Commission in the application of Section 70 (Benefit of the Doubt) of the Act. It suggested no practical means of effectuating this, however.

Representations and Evidence

Your Committee has reviewed the problems posed in the area of interpretation, particularly as these relate to Appeal Boards. In the absence of positive recommendations from the Legion for their rectification, your Committee has had to consider other recommendations and devise other means.

A review of the background of the report adopted by the Legion and forming the basis of its presentation to this Committee disclosed that the main emphasis was directed against appeals to courts of law.

HISTORY

On June 3rd, 1916, by Order-In-Council PC 1334, the Canadian Government withdrew disability pension jurisdiction from military authorities and vested it in an organization known as "The Board of Pension Commissioners". This Board, consisting of three members, was given exclusive jurisdiction in the awarding of pensions.

The first Pension Act, as such, was enacted in 1919. ⁷ This Act provided for continuation of the exclusive jurisdiction of the Board of Pension Commissioners. The provisions for appeal were contained in Section 18 which stated:

18. Two or more Commissioners shall sit for the purpose of hearing the appeals of dissatisfied applicants or pensioners. Any such appeal shall be made in writing within one year of the date of the decision appealed from, and may be presented either personally by agent, or by counsel. The decision of the Commission upon such appeal shall be final.

Veterans organizations did not consider this form of appeal entirely impartial. Accordingly, representations were made to the Parliamentary Committee on Veterans Affairs of 1921-22, for some form of appeal body independent of the Board of Pension Commissioners.

History

Upon the recommendations of this Parliamentary Committee, a Medical Appeal Board was created by Order-In-Council PC 1526 of July 22, 1922. This Board comprised three medical doctors operating under jurisdiction of the Department of Soldiers Civil Re-Establishment, and not connected with the Board of Pension Commissioners.

1922

The chief function of this Medical Appeal Board was to review decisions of the Board of Pension Commissioners as to entitlement and assessment. The grounds for review were:

- (a) Entitlement: Where the Board of Pension Commissioners had given a decision contrary to that of the Pensions Branch doctors in the District Office; and
- (b) Assessment: Where the pension had been adversely dealt with by the Board of Pension Commissioners, without or contrary to the opinion of the Pensions Branch doctors in the District Office.

Because of the provision of the Pension Act to the effect that the decisions of the Board of Pension Commissioners were final, the powers of the Medical Appeal Board were purely advisory.

Almost immediately after the establishment of this Medical Appeal Board, an Order-In-Council ⁸ established the Royal Commission on Pensions and Re-establishment under the chairmanship of Lieut. Col. J.L. Ralston. 1922-24 It was a recommendation of this Royal Commission that an appeal system be established. This is found in the Royal Commission's first interim report. The Royal Commission made the following comments: ⁹

To those familiar with judicial systems, it will seem somewhat striking that the Pension Act, 9-10 George V, Chapter 43, particularly Section 7, vests in a body consisting of three Commissioners at Ottawa, the sole, original and final jurisdiction to determine the rights of applicants for pension for the whole of Canada. There is no appeal, control or effective review by any outside body, and the Pension Board is not subject nor amenable to any ministerial or departmental instruction.

History

In general, the Royal Commission recommended the establishment of: ¹⁰

- (a) District Review Boards for each of the nine districts of the Department of Soldier's Civil Re-establishment; and
- (b) A Federal Appeal Board for Canada, the personnel of each such Tribunal to consist of a medical man, a lawyer, and a layman, at least two of whom shall be ex-servicemen.

The recommendation envisaged that the applicant would submit his appeal to the appropriate District Review Board, which would, in turn, make a recommendation to the Board of Pension Commissioners. Where a recommendation favourable to the applicant was not carried out by the Board of Pension Commissioners, or where a recommendation was unfavourable to the applicant, the recommendation and file would be automatically submitted to the Federal Appeal Board. This Board would be empowered, without formal hearing, to approve or disapprove the recommendations of the District Review Board.

This proposal of the Royal Commission was studied by a Select Committee of the Senate which recommended the disbanding of the Medical Appeal Board and substitution of a Federal Appeal Board. Legislation for the establishment of such Federal Appeal Board was enacted in 1923. ¹¹

The Federal Appeal Board thus established did not correspond fully with the Royal Commission's recommendations. For example, no action was taken concerning the suggested District Review Boards. Further, the jurisdiction of the newly-created Federal Appeal Board was restricted to entitlement claims. Public hearings were permitted but the representations were limited to a review of entitlement claims based on the evidence and record of the Board of Pension Commissioners in the initial decision.

History

The sections of this legislation establishing the Federal Appeal Board stated:

Section 10(1) There shall be a Board, to be known as "The Federal Appeal Board," consisting of not less than five nor more than seven members appointed by the Governor-in-Council on the recommendation of the Minister of Justice.

Section 11(1) Upon the evidence and record upon which the Board of Pension Commissioners gave their decision an appeal shall lie in respect of any refusal of pension by the Board of Pension Commissioners on the grounds that the disability resulting from injury or disease or the aggravation thereof or that the injury or disease or the aggravation thereof resulting in death was not attributable to or was not incurred during military service.

Section 11(2) Every member of the Board shall also have the right to hear, but only upon the evidence and record upon which the Board of Pension Commissioners gave its decision, such appeals at such times and places as are fixed by regulations made and approved by the Board, and to give decisions thereon. The member giving any such decision shall notify the applicant who has so appealed and the Board of Pension Commissioners for Canada, by registered letter mailed within five days after such decision; and if such applicant or the Board of Pension Commissioners for Canada is not satisfied with such decision an appeal therefrom may be lodged within thirty days from such decision with the Federal Appeal Board, a quorum of whom, not including the member of the Board who originally gave the decision, shall hear the appeal and the decision of the Board thereon shall be final.

Section 11(3) The right of appeal shall be open for one year after the appointment of the Federal Appeal Board by the Governor-in-Council, or for a like period after the decision complained of, whichever may be the later.

Section 11(4) An applicant shall be entitled to only one appeal upon the grounds or any of them set forth in subsection (1) of this section of this Act. The decision of the Federal Appeal Board thereon shall be final and shall be binding upon the applicant and upon the Board of Pension Commissioners for Canada.

Section 11(5) Every applicant and the Board of Pension Commissioners for Canada or its representative shall have the right to attend in person, at any and all sittings for the purpose of hearing an appeal held by the Board or by a member thereof, under such conditions as to the payment of an applicant's expenses thereby incurred as may be fixed by regulation of the Governor-in-Council, and the applicant may if he so desires, but at his own expense, be assisted thereat, by counsel or representative other than the official Soldier Adviser appointed under The Department of Soldiers' Civil Re-establishment Act.

History

The Federal Appeal Board was appointed by the Governor in Council on August 17th, 1923. The following excerpt from its report dated December 31st, 1929, is quoted hereunder: ¹²

The first appeal was argued before the Board in Ottawa on October 9th, 1923. Since that time sessions have been held in centres throughout the country from Charlottetown, P.E.I., to Victoria, B.C. In general the Board has endeavoured to function as an authority through which grievances, whether well founded or not, can be voiced and finally settled in a public yet orderly manner. No attempt has been made to restrict those whose grievances may not be well founded from placing their claims before the Board. It is considered that this policy not only engenders respect for the law but avoids the possibility of criticism through an appearance of discrimination.

There has been a disposition on the part of individual appellants to accept the finality of the Board's decision without complaint.

From August 17th, 1923, to March 31st, 1929, the Board dealt with 6,647 appeals at formal hearings with the following results:

Allowed	1,410
Disallowed	4,571
Cases outstanding; adjusted after a hearing without issue of judgment or adjourned	666
	<u>5,647</u>

Note: (1) In addition 1,139 claims were re-opened and adjusted by the Board of Pension Commissioners after an appeal had been taken to the Federal Appeal Board.

(2) The percentage of allowed appeals was 23.5.

The following excerpt ¹³ from the report of the Federal Appeal Board is of direct interest.

History

JURISDICTION QUESTIONED - Since the Federal Appeal Board began work, it has handed down several judgements in favour of appellants to which effect has not been given by the Board of Pension Commissioners for Canada on the grounds that the Appeal Board was without jurisdiction in the cases concerned. In some of these cases the Commission has reconsidered its decision as a result of an expression of opinion by the Department of Justice and has carried out the judgement. The six remaining cases are being made the subject of a reference to the Exchequer Court of Canada.

This Federal Appeal Board functioned from 1923 until 1930. In addition to being hampered by the lack of staff, it had a problem of jurisdictional restriction. It was empowered to deal only with the question of whether or not an application for pension could be considered as having been attributable to or having been incurred during military service. It was not authorized to deal with appeals arising from any supplementary benefit under the Pension Act (e.g., dependent parents' pension), or with appeals concerning the degree of assessment or the degree of aggravation of an injury or disease.

Accordingly, during a period between August 17th, 1923, and March 31st, 1929, this Board refused to deal with a total of 3,862 appeals because they were ruled upon as being outside its statutory jurisdiction.

The legislation setting up the Federal Appeal Board provided that the decision of the Board on an appeal be final and binding upon the applicant and upon the Board of Pension Commissioners. Notwithstanding, the Board of Pension Commissioners did refuse to implement several of the Appeal Board's decisions on the grounds that such were ultra vires.*

* See reference to report of Brigadier General Alex Ross, Page 67 hereof.

History

It would appear that in the years 1928, 1929 and 1930 there was a mounting volume of complaints regarding the appellate machinery in regard to pensions. Accordingly, the matter of pension adjudication procedures was referred to the 1930 Special Parliamentary Committee on Pensions and Returned Soldiers' Problems for study.

This Parliamentary Committee formulated an entirely new plan of appellate review. It superimposed upon the Board of Pension Commissioners a system consisting of:

- (a) The Pension Tribunal, generally described as a "court of first instance".
- (b) The Pension Appeal Court, generally described as a "court of final recourse".

The Pension Tribunal consisted of nine members, divided into four quorums of two members each, with one member at large. Canada was divided into four districts with a quorum of the Pension Tribunal allotted to each district. Cases which had been rejected by the Board of Pension Commissioners could be reviewed by a quorum at public hearings in localities within their allotted districts. The relevant sections of the Pension Act read as follows: 14

- 56. The Pension Tribunal shall be charged with the duty of hearing and disposing of all applications under this Act which may be brought before it as hereinbefore provided.
- 57. For the purpose of applications the Pension Tribunal shall sit at convenient places throughout Canada; the selection of such places, the determination of the days for sitting at each thereof, and the assignment of members of the Tribunal to attend thereon, shall be in the discretion of the Chairman subject to such rules of procedure as may be adopted hereinbefore provided.

History

58. Two members of the Tribunal sitting together shall form a quorum for the purpose of hearing and disposing of any application as to the disposition of which they are in agreement; any application as to the disposition of which there has been an equal division of opinion shall be re-heard before an uneven number of members exceeding by at least one the number of members who took part in the first hearing.

59. The Pension Tribunal shall have all the powers of a Commissioner under Part I of the Inquiries Act and may exercise any discretion conferred by this Act on the Commission.

The Pension Appeal Court was a court of appellate jurisdiction. It consisted of three members and sat only in Ottawa. It was empowered to hear appeals from decisions of the Pension Tribunal submitted either on behalf of the applicant or on behalf of the Board of Pension Commissioners. The appeals were presented by the Veterans' Bureau on behalf of a claimant and by a Commission counsel on behalf of the Board of Pension Commissioners with the stipulation that such appeals must be on the evidence and record upon which the decision of the Pension Tribunal was given.

The Sections of the Pension Act of 1930 which dealt with the procedure of the Pension Appeal Court are set out hereunder: 15

65. From the decision of the Pension Tribunal on any application falling within one of the classes hereinafter defined, the claimant or the Commission counsel may appeal to the Pension Appeal Court within the time hereafter limited by filing notice of intention to appeal with the registrar of the Pension Appeal Court, who shall notify the Department, the chief pension advocate and the chief Commission counsel, of the receipt of such notice and of the time at which the appeal will come on to be heard.

History

68. The Pension Appeal Court shall hear and dispose of all appeals from the Pension Tribunal which may be properly brought before it. 1930, c.35, s.14.

69. The sittings of the Pension Appeal Court shall be public except in cases in which the hearing by the Pension Tribunal has been held in private and the Pension Appeal Court considers it desirable to adopt a like course in respect of the hearing of the appeal. 1930, c.35, s.14.

71. Every appeal shall be presented before the Pension Appeal Court on behalf of the claimant by a Commission counsel in the same way as it is required to be presented before the Pension Tribunal, but on the evidence and record upon which the decision of the tribunal was given, without addition.

2. The Pension Appeal Court, if it considers such evidence or record to be incomplete or unsatisfactory, may remit the case to the Pension Tribunal for re-hearing. 1930, c.35, s.14.

72. Subject as hereinafter provided every decision of the Pension Appeal Court in favour of an applicant or dismissing an application shall be final.

2. Any decision in favour of a claimant shall be forthwith notified by the registrar to and shall be forthwith acted upon by the Department.

3. Any decision of the Pension Appeal Court against an applicant and any such decision by the Pension Tribunal which is not appealed shall be final and no application based upon any error in such decision, by reason of evidence not having been presented or otherwise, shall be entertained by the Commission or the Pension Tribunal except with the leave of the Pension Appeal Court, which shall have jurisdiction to grant such leave in any case in which it appears proper to grant it.

It was stated in positive terms that the decision of the Pension Appeal Court would be final and that any decision in favour of a claimant would be acted upon by the Commission. This appeared designed to overcome one of the major difficulties in respect to the operation of the former Federal Appeal Board.

History

It would appear, however, that complaints continued and it can be assumed, notwithstanding, that the Appeal system consisting of the Pension Tribunal and the Pension Appeal Court did not prove satisfactory. Accordingly, by Order-In-Council of August 4, 1932,¹⁶ the Government established a Committee¹⁷ which was empowered "to carry on an investigation into the administration of the Pension Act, and to report thereon with such suggestions or recommendations that may be advisable".

The Chairman of this Committee was the Honourable T. Rinfret, Justice of the Supreme Court of Canada. Five members were nominated from veterans organizations. Another five members were: The Chairman of the 1932-33 Board of Pension Commissioners, a member of the Pension Appeal Court, the Chairman of the Pension Tribunal, the Deputy Minister of Pensions and National Health, and the Chief Pensions Advocate.

Three separate reports were submitted by the members of the Committee. The Honourable Louis Arthur Audette, retired Judge of the Exchequer Court of Canada, who replaced the Honourable T. Rinfret by Order-In-Council dated December 2nd, 1932, recommended that:¹⁸

- (1) The Pension Tribunal be abolished. His report contained the following comment:

There is no raison d'être, no occasion, for the existence of two courts of first instance having identical jurisdiction and power, passing and rendering judgement upon the same matter, as is now done by the Board (of Pension Commissioners) and the Tribunal.

- (2) The Board of Pension Commissioners be increased to nine, and from this increased personnel there be established "travelling boards under the control and direction of the Chairman of the Board of Pension Commissioners, consisting of a quorum of two persons to include, if possible, one lawyer, and at least one medical man, preferably those who have had previous

History

training and experience under the Pension Act, that such Travelling Boards, if possible, to meet informally with the applicant, his witnesses, Pensions Advocate, Medical Examiners, and any other intricate parties to hear the grounds and evidence in support of the veteran's claim.

- (3) The Pension Appeal Court, as a court of appeal and review, be continued and be vested with the right to receive further evidence.

The report, submitted by Brigadier General Alex Ross of the Canadian Legion on behalf of the veterans organizations, recommended that: ¹⁹

- (1) The Board of Pension Commissioners and Pension Tribunal be merged; and
- (2) The Pension Appeal Court be retained in its existing form with the proviso that an officer be appointed by the Department of Pensions and National Health "to have the duty of having to decide whether or not the Crown will appeal". This officer should be absolutely free from influence and for that reason should perhaps be an officer of the Court of Appeal under the jurisdiction of the president.

The report submitted by Brigadier-General Ross made reference to what is considered to be one of the main reasons why the pension system in effect at that time was not satisfactory. This reference reads as follows: ²⁰

Another matter to which our attention was drawn refers to five applications in which entitlement was recommended by the old Federal Appeal Board. The Board of Pension Commissioners took exception to the jurisdiction of that Board to give entitlement in these cases. However, the judgment of the Board, which is in effect the judgment of a court of record, has never been set aside, and according to the record, these men should be entitled to receive the monies awarded to them. We did not go fully into the cases as they could not be considered within the scope of our enquiry, but the attention of the Government is drawn to the matter as a source of irritation making

History

it difficult for the pension machinery to function smoothly. I submit that it is the duty of the Government either to have the judgment of the Federal Appeal Board set aside if it is in fact in error, but if not, it stands as a judgment in favour of the men and should be carried out. Such irritations do more to interfere with the smooth operation than anything else that can be imagined.

The report submitted by Mr. L.P. Sherwood, Member of the Pension Appeal Court, concurred in by Brigadier-General H.F. MacDonald of the Pension Tribunal, recommended that: ²¹

- (1) The Board of Pension Commissioners continue to hear pension claims in the first instance, with the proviso that an applicant whose claim is refused shall have the right to be heard at a public hearing before a quorum of Commissioners "in the same manner as cases are heard by the Tribunal under the Act".
- (2) The Pension Appeal Court be continued.

The Committee appointed to investigate into the administration of the Pension Act recommended changes in pension appeal procedure and legislation was accordingly enacted. The changes were: ²²

1933

- (1) The Pension Tribunal and the Board of Pension Commissioners were abolished.
- (2) A new body was created, known as the Canadian Pension Commission, with powers and functions similar to those of the Board of Pension Commissioners. Quorums of the Commission, to consist of not less than two members were provided, to hold sittings throughout Canada to hear pension appeals.
- (3) The Pension Appeal Court, as established by amendment of the Pension Act of 1931 was to remain in operation with final powers of decision in regard to applications for entitlement to pension, and with the responsibility for interpretation of the Pension Act.

Between 1933 and 1939 the system of pensions adjudication remained 1939 static. In 1939, both the Pension Appeal Court and the system of handling appeals through quorums of the Pension Commission were abolished by statute.²³

History

The responsibility for final appeals was transferred to Appeal Boards composed of panels of three members of the Pension Commission.

The power formerly vested in the Pension Appeal Court to act as final arbiter in matters of interpretation of the Pension Act was conferred upon the Pension Commission in 1941. *

With the elimination of the Pension Appeal Court, there was no longer an appeal in the true sense of the word. There was recourse to an Appeal Board composed of members of the Commission. However, appearances before this Appeal Board represented the first actual hearing of the case where an applicant could appear with his supporting witnesses, and the case could be argued in a public forum. The initial adjudication of pension applications was conducted by Commissioners on the basis of the written record. Hence, although the applicant was given the right to appeal, such appeal was only from this initial adjudication, without the provision of an appeal beyond the Commission itself. In other words the applicant's first personal appearance was at the hearing designated as an appeal but which was, in effect, his first comprehensive hearing.

The reasons for the elimination of the Pension Appeal Court appear to be clouded in history. It is evident, however, from an examination of the statistics relating to the activities of the Pension Appeal Court that the percentage of appeals allowed in favour of the applicant was low. These figures, taken from the Annual Reports of the Department of Pensions and National Health for the fiscal years 1935 to 1939, are quoted hereunder:

* See Volume I, Chapter 2, page 30 hereof.

History

<u>Year</u>	<u>Submitted By</u>	<u>Total Appeals</u>	<u>No. Granted</u>
1934 -35	Pension Applicants The Crown	1,664 88	17 42
1935 -36	Pension Applicants The Crown	1,840 68	16 22
1936 -37	Pension Applicants The Crown	2,440 85	22 24
1937 -38	Pension Applicants The Crown	2,285 78	19 17
1938 -39	Pension Applicants The Crown	991 57	14 11

The small measure of success met with by veteran applicants could hardly be expected to lead to any measure of general satisfaction among veterans organizations.

The abolition of the Pension Appeal Court in 1939 does not prove its ineffectiveness, per se. Unfortunately the statistics do not show the effect of the Pension Appeal Court (if any) on the decisions of the Canadian Pension Commission at what might be termed the initial level. It is possible the mere existence of the Pension Appeal Court may well have affected the attitude of mind of the Commission. This supposition is, of course, based on the natural inclination of an administrative body to proceed more carefully where matters are the subject of a subsequent review by an appellate body.

APPEAL PROCEDURE

The procedure of the Pension Commission provides that, following an unfavourable decision on entitlement, the applicant is notified concerning the procedure should he wish to renew his claim or request a hearing before an Appeal Board of the Commission. The relevant section of the form * used by the Commission for this purpose is quoted hereunder:

I am enclosing a copy of Section 60 of the Pension Act, from which you will observe that you may: -

- (a) Renew your claim before the Commission at any time by producing additional evidence, or
- (b) If you have no additional evidence to offer, you may request a hearing before an Appeal Board of the Commission sitting in the district in which you live.

The Commission feels that it is only fair to point out that, if you elect an Appeal Board Hearing, the decision of such Board is final. For this reason, before decision on which course of action you will take, the Commission strongly advises you to consult with the Pensions Advocate of the Veterans' Bureau, Department of Veterans Affairs, for your district, or the Service Bureau of an incorporated veterans organization. The addresses of the Pensions Advocates for the various districts in Canada will be found on the reverse of this letter. The assistance of the Service Bureau of a veterans organization can be obtained through your local branch of that organization. The services of the Pensions Advocate and the Service Bureau of incorporated veterans organizations are free of charge. You may, however, if you wish, obtain the assistance of other representatives at your own expense.

The Veterans' Bureau of the Department of Veterans Affairs, is charged with the responsibility to assist an appellant, including the preparation of a Summary of Evidence pertaining to the appeal. Copies of this summary are furnished to the appellant. Should the appellant elect to be represented by a veterans organization, or by his own solicitor, copies of the Summary of Evidence are furnished also to these representatives.

* Canadian Pension Commission form letters, 52,66A,928, 929 and 930

APPEAL PROCEDURE

The appellant is then asked to study the Summary of Evidence and to complete a "Statement of Claim" required in connection with Section 60(5)(b) of the Act which reads as follows:

60(5)(b) That prior to the Appeal Board Hearing, the applicant has submitted to the Commission a statement, signed by himself, setting forth all disabilities that have been previously ruled on adversely by the Commission, and that he claims to be the result of injury or disease, or aggravation thereof attributable to, or incurred during Military Service, in regard to which he may desire to claim pension.

The Statement of Claim form is submitted to the Appeal Board Division of the Commission and the appeal is scheduled for a hearing on the next Appeal Board sitting in the appellant's district.

Itineraries for Appeal Board sessions are prepared by the Pension Commission several weeks in advance. The District Pensions Advocates in the Districts where sessions are to be held submit to the Appeal Board Division of the Pension Commission in Ottawa, a list of the cases they desire to present, and the witnesses who will appear.

The Pensions Medical Examiner in each District is notified of the names of those Commissioners who may be ineligible to hear an appeal by reason of having signed a previous unfavourable decision in regard to a case listed for appeal. The District Pensions Advocate is advised of such information, and is requested either to arrange that the applicant sign a waiver of consent, permitting the ineligible Commissioner to hear the case notwithstanding his association with a previous unfavourable decision, or, alternatively, the applicant indicates that he is not prepared to allow an ineligible Commissioner to hear the appeal, and the case is set over for a later Appeal Board hearing.

APPEAL PROCEDURE

Appeal Board meetings are held in the major cities in Canada and, upon occasion, in some of the smaller centres. Where Appeal Board sittings are held in the same location as District Offices of the Department of Veterans Affairs, the premises of the Department are sometimes used. In other localities, Appeal Boards meet in hotels, court houses and other available accommodation.

It has been the practice of the Commission to handle five cases per day during an Appeal Board sitting. In smaller centres, such as North Bay, an Appeal Board sitting is held once every six months. The Committee heard complaints to the effect that, should a veteran withhold consent for an ineligible Commissioner to hear a case on which he was given a previous adjudication, he would presumably have to wait until the next Appeal Board session in his District. This could cause a total delay of a year, or even longer if, on the subsequent Appeal Board, another ineligible Commissioner was appointed for whom the applicant considered that he would necessarily have to withhold consent to hear the case.

The Appeal Board Division of the Commission prepares a docket for use of each Appeal Board member before whom the case will be heard. These dockets contain copies of former Commission decisions on the case, and are passed to the members of the Board on the day of the hearing, and in the presence of the appellant. A copy of the Summary of Evidence is supplied to each member by the District Pensions Advocate when the case is called for hearing.

It is noteworthy that the members of an Appeal Board do not have an opportunity to study the documents concerning the case prior to the actual hearing, and at that time are furnished only with copies of the previous decision or decisions and with the Summary of evidence.

APPEAL PROCEDURE

The Committee did learn, however, that upon occasion an Appeal Board member could have access to the District Office file during or after an Appeal Board hearing.

Two Commissioners* who appeared before the Committee were of the opinion that it might be valuable for Appeal Board members to have additional information as part of the docket given to Commissioners at Appeal Board hearings.

One Commissioner, in speaking of the so-called "white slips" on which members of the Medical Advisory Branch of the Commission write medical opinions for consideration of Commissioners, stated: ²⁴

I think they would be quite helpful if they were available to the Board, for this reason. The Medical Officer who prepares the "white slip" is the person who knows the whole medical picture relating to this veteran.

We may have a claim where on the surface it may not look as if it is a congenital condition, so there may have been a pre-enlistment record, but the degree of disability is not on the record that we have before us as a Board, if he has no entitlement - if he is coming in fresh without an entitlement. The natural history of the condition (whether it is progressive; whether it is long; it takes a long time to develop, and so on, and so on.) I feel that with this information before the Board in the form of a "white slip" - which I am not sure should be available to the Commission only; it should be available to the Veterans Bureau - we would be in a better position to ask the proper questions of the medical specialist brought in to give evidence on the part of the veteran.

So on that ground, I would say that the "white slip" would be quite helpful.

Another Commissioner stated that, at an Appeal Board hearing, he would not necessarily wish to see the white slip but commented: ²⁵

* Mr. D.G. Decker and Mr. W.P. Power

APPEAL PROCEDURE

I would rather see, if I were to see anything, a brief resume of what the claim was about, so that, while listening to the evidence on the presentation, the individual Commissioner would not have to leaf through the Summary of Evidence - which is sometimes very thick, very voluminous, to find out what the claim is all about.

Now, whether these summaries were made available to him the day before he left the office, or whether they were given to him on arrival at wherever he happened to be going, is a matter of no consequence, as far as I am concerned, but I think he should have information with him so that he can devote all of his time to listening to the presentation of the claim and to the witness. He would perhaps not have all the information at his finger tips.....but at least after having gained sufficient experience in the business of adjudicating Appeal Boards he would have sufficient knowledge to be able to, with the help of his precis, ask a specialists' opinion, who is appearing on behalf of the applicant, and ask relevant questions.

During the course of an appeal session, if the District Pensions Advocate or the veteran's representative sees fit, he may:

- (a) Request that the appeal be not now heard on the grounds that new evidence is available or is being sought; or
- (b) Ask that the case may be proceeded with but that no final decision be given at such hearing, at the same time seeking permission of the presiding officer of the Appeal Board to obtain further evidence to be brought before the Appeal Board at a later hearing. Should the applicant's counsel seek to have such later hearing by an Appeal Board to be named for the purpose of taking evidence not available in the summary of Evidence, the Appeal Board in the field may agree to defer decision until after this later hearing, in which case the Appeal Board would proceed with the evidence available at the time and postpone the decision until the later evidence is taken.

Your Committee noted some instances where the members of an Appeal Board, having heard a case, found themselves in need of further evidence by way of specialist medical opinion before writing the decision. On such occasions it became the responsibility of the presiding member of the board to refer the case to a specialist or specialists for advice.

APPEAL PROCEDURE

In this respect it is the rule of the Commission that, should the new evidence be adverse to the claim, such must be presented to the applicant or his advocate to provide an opportunity for rebuttal of evidence before the Appeal Board makes its decision.

It appears that, in most instances, Appeal Boards followed the policy of writing the decisions in the field. Such decisions are signed by the members on their return to Ottawa, and promulgated through the administrative channels of the Commission.

The statistics regarding appeals handled by Appeal Boards of the Commission for the fiscal years 1964-65 and 1965-66 are given below: ²⁶

		<u>1964-65</u>	<u>1965-66</u>
Total Cases		1361	1186
	Favourable	564	441
	Adverse	797	745
World War I (Total)*		371	262
	Favourable	92	75
	Adverse	279	187
World War II (Total)**		990	924
	Favourable	472	366
	Adverse	518	558

The percentage of successful appeals is of interest. The successful appeals for the past two years by or on behalf of World War I personnel have been approximately 25% of the total appeals from this group. This would appear to be relatively high, in view of the fact that the war service under which such application must qualify occurred 50 odd years ago.

Of the total number of appeals submitted by or on behalf of World War II personnel, approximately 47% and 55% were successful for the past two years respectively. This figure too would seem, in the Committee's judgement, to be relatively high.

* World War I includes peacetime service claims.

** World War II includes Korea service claims.

COMMITTEE RECOMMENDATIONS

- (11) That the existing system of hearings under Section 7(3) of the Pension Act continue to function and be expanded to provide for personal appearances for unsuccessful applicants for benefits under the discretionary sections of the Act, and for the purpose of hearing complaints in regard to a matter of assessment or the degree of aggravation of a disability. *
- (12) That procedures now called "Initial and Renewal Hearings" for World War II personnel, and "First and Second Hearings" for World War I personnel and Regular Force and militia personnel, be replaced by one similar procedure to be known as: **
- (A) First application;
 - (B) Second application;
 - (C) Renewal applications, such not to be limited in number.
- (13) That the existing system of Appeal Boards of the Commission be retained in effect but such Appeal Boards be re-named "Entitlement Boards". The hearings which they conduct should be known as "Entitlement Hearings" at which an applicant for entitlement could make a personal appearance, and to be conducted in a manner similar to the existing Appeal Board procedure. ***
- (14) That an appellate body be appointed, based on the following principles:
- (A) Such appellate body to be called the Pension Appeal Board.

* See Volume I, Chapter 3, re "Personal Appearances"
 ** See Volume I, Chapter 9, re "Application Procedure"
 *** See Volume I, Chapter 5, re "Entitlement Boards"

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COMMITTEE RECOMMENDATIONS

- (B) An appeal will lie to the Pension Appeal Board after an applicant has exhausted recourse to the system of personal appearances under Section 7(3) of the Act for matters other than entitlement, or has had a hearing before an Entitlement Board if the applicant is seeking entitlement. Appeals to Board
- (C) When an applicant in an entitlement claim has received an unfavourable ruling from an Entitlement Board and he secures new evidence, he may either apply for leave to re-open before the Pension Commission in accordance with Recommendation No. 20* or, he may submit an appeal to the Pension Appeal Board, as he sees fit. New Evidence
- (D) Appeals to the PENSION APPEAL BOARD shall lie:
- (i) As of right on applications involving entitlement to pension Entitlement as of Right
- (ii) With leave from the PENSION APPEAL BOARD or any member thereof as the Board may specify, on;
- (a)-- other awards under the Pension Act where the Pension Commission has discretionary powers;
- (b)-- In matters of assessment of the degree of a disability; and
- (c)-- In decisions regarding the degree of aggravation of injury or disease. Other Benefits With Leave
- (E) Appeals may be initiated by an appellant, or on behalf of an appellant, by the Veterans' Bureau or the representative of a recognized veterans organization. Where an appellant has died subsequent to the date upon which a decision has been rendered by the Pension Commission, an appeal may be submitted by a surviving dependant but the time limit of one year (see paragraph (g)) will apply. Appeals Where Claimant Dies

* See Recommendation No. 20, Chapter 6, page 15L hereof.

COMMITTEE RECOMMENDATIONS

- (F) On any decision taken as the result of a Section 7(3) hearing or an Entitlement Board the applicant will be informed of the appeal procedures available to him, as follows:
- Applicant To Be Informed
- (i) Leave to re-open by the Pension Commission; and
 - (ii) Appeal to the PENSION APPEAL BOARD as of right in an entitlement claim and with leave on other discretionary matters under the Pension Act.
- (G) The applicant should, as of right, have a period of one year from the date of final decision by the Pension Commission in regard to an application for any benefit except that appeals to the PENSION APPEAL BOARD may be permitted on any matter where a decision has been made by the Pension Commission prior to the coming into being of the PENSION APPEAL BOARD, and there shall be no time limit by which application on such decision must be placed before the BOARD. The period for any appeal may be extended by the PENSION APPEAL BOARD.
- One Year Limitation
- (H) The PENSION APPEAL BOARD shall sit in Ottawa and in such other places as may be required and the Board may decide.
- Location of Sitting
- (I) Appeals before the PENSION APPEAL BOARD shall consist of:
- Types of Appeals
- (i) Review of the written record
 - (ii) A review of the written record, supported by an appearance of those representing the appellant; or
 - (iii) A hearing de novo by leave of the Board.
- (J) Appellants shall have the right to make written submissions, or have the same made on their behalf in all matters of appeal. In hearings de novo, and in such other cases as the BOARD in its discretion may decide, representations may be made by the Veterans' Bureau of the Department of Veterans Affairs, a representative of a Service Bureau of a veterans organization or by such other person as the appellant may retain for the purpose.
- Written Submissions

COMMITTEE RECOMMENDATIONS

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| <p>(K) The Pension Commission shall be permitted to file written reasons for its decisions, in addition to those contained in the findings under review. These findings shall include the medical precis.</p> | <p><u>Commission</u>
<u>May File</u>
<u>Written</u>
<u>Reasons</u></p> |
| <p>(L) Notwithstanding the rights of submission and appearance hereinbefore set out, the PENSION APPEAL BOARD shall have a wide discretion as to who may appear before it, and the evidence it may receive. The Board should have the right to institute further investigation in any case, in which it deems that additional information is required.</p> | <p><u>Board</u>
<u>To Have</u>
<u>Discretion</u></p> |
| <p>(M) A record shall be kept of all reviews and hearings and all oral evidence shall be taken by court reporter, reporting equipment or other effective means.</p> | <p><u>Transcript</u></p> |
| <p>(N) The PENSION APPEAL BOARD shall be empowered to appoint a MEDICAL ADVISORY PANEL on a part-time basis, from among medical specialists residing within the borders of Canada, such Panel to be available to give opinion on written questions concerning the interpretation of medical evidence. Medical opinions may also be secured by the Board from recognized medical schools, universities, clinics or medical institutions under any arrangements deemed advisable by the Board. Such opinion must be given in writing and be available for examination by those representing the appellant and by the Pension Commission.</p> | <p><u>Medical</u>
<u>Advice</u></p> |
| <p>(O) The PENSION APPEAL BOARD shall be empowered to appoint a LEGAL ADVISORY PANEL on a part-time basis from among legal specialists residing within the borders of Canada, such panel to be available to give opinions on written questions concerning the interpretation of the Pension Act or any matter affecting pensions under this Act. Such opinion must be given in writing and be available for examination by those representing the appellant and by the Pension Commission.</p> | <p><u>Legal</u>
<u>Advice</u></p> |

COMMITTEE RECOMMENDATIONS

- (P) Fees for medical and legal opinions shall be paid from the BOARD's financial vote at rates approved by the BOARD, and such fees shall not be subject to usual government regulation, but shall be reasonable in the judgment of the BOARD. Payment Of Fees
- (Q) The PENSION APPEAL BOARD to be independent of the Pension Commission, and, like the Commission, to be constituted as an agency reporting to, but independent of, the Minister of Veterans Affairs. Independent Agency
- (R) The PENSION APPEAL BOARD to decide questions of interpretation referred to it as provided. Interpretation
- (S) The PENSION APPEAL BOARD shall consist of five or more persons, to be appointed in like manner and for the same term as Pension Commissioners. On appeals involving entitlement the quorum of the BOARD shall be not less than three. On all other matters the quorum shall be such number as the BOARD may decide. Number, Appointee Quorum
- (T) The PENSION APPEAL BOARD be empowered to decide: Types of Application Appeals
- (i) Awards of entitlement;
 - (ii) Discretionary awards under the Pension Act;
 - (iii) Increases in assessment; and
 - (iv) Increases in the degree of aggravation.
 - (v) All other matters arising from claims under the Pension Act.
- (U) The PENSION APPEAL BOARD shall have power and authority to deal with and adjudicate upon all matters and questions relating to awards, and increases of any pension or allowance, in like manner to the Pension Commission and effect shall be given by the Department of Veterans Affairs and the Comptroller of the Treasury to the decisions of the BOARD. The decision of the PENSION APPEAL BOARD should be final. Powers of Board

COMMITTEE RECOMMENDATIONS

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| (V) The Pension Appeal Board shall be required to reach a decision from the following time limit: | <u>Time Limits
For Pension
Appeal Boards</u> |
| (i) 30 days from the receipt of an appeal where such is disposed of by a review of the record. | |
| (ii) 60 days from the receipt of an appeal where such is disposed of by means of a written record with an appearance by those representing the appellant. | |
| (iii) Six months from the date of receipt of an appeal where such is disposed of by means of a hearing de novo. | |
| (W) The Pension Appeal Board may reserve its decision on a case where it is determined that further evidence or clarification of evidence is essential for a complete and impartial appellant's determination, but a final decision must be reached within the time as set out in paragraph(V) . | <u>Reserve
Decisions</u> |
| (X) The expenses of an appellant and of witnesses required to appear before a hearing of the Pension Appeal Board shall be provided in the same manner as for Appeal Boards (proposed Entitlement Boards) of the Pension Commission. | <u>Expenses</u> |
| (Y) Provision be made, where an appellant is unable to appear before a hearing, for one member of the PENSION APPEAL BOARD to interview him at his home or in such other location as may be suitable. The member would be required to prepare a report of the evidence and testimony of the appellant, such to be filed before a quorum of the BOARD for decision. | <u>Personal
Interview</u> |
| (Z) The permanent staff for the PENSION APPEAL BOARD, other than those engaged in routine and clerical positions, shall be appointed under the direction of the Chairman of the Board. Such personnel shall <u>not</u> be members of the Public Service of Canada. Accommodation shall be provided in a building other | <u>Staff</u> |

COMMITTEE RECOMMENDATIONS

than that occupied by the Canadian Pension Commission. Salaries and other administrative expense shall be provided through a vote of the Department of Veterans Affairs.

- (AA) The Chairman of the Pension Appeal Board, within a year after its coming into effect, and thereafter for each succeeding fiscal year, should make a report on the proceedings of his Board to the Minister of Veterans Affairs, who would presumably lay such report before Parliament.

Annual
Report

- (BB) The Chairman of the Pension Appeal Board should be required, from time to time, to submit recommendations to the Pension Commission for revision and/or improvement in regard to interpretations, procedures, administration, and other matters affecting pensioners or their dependants. In addition, the Pension Appeal Board should be required from time to time, to submit recommendations to the Minister regarding legislative amendments which may appear to be required.

Recommendation
For Changes
In Procedure
or Legislation

COMMENTGeneral

The Committee concludes that the existing appeal system has been reasonably successful in ensuring that applications for entitlement under the Pension Act are the subject of an adequate system of review including:

- (a) An initial consideration based on available records;
- (b) A second or subsequent consideration based on available records; and
- (c) A personal hearing of the applicant, supported by his witnesses, before an Appeal Board of the Commission.

It is apparent, however, that it is incorrect to consider that this system involves an appeal in the true sense of the word. The initial and subsequent adjudications as set out in (a) and (b) above are not "hearings" in that neither the applicant nor his advocate makes a personal appearance. They are, rather, administrative reviews of the file upon which the Pension Commission bases a finding.

Subsequently, the hearing before an Appeal Board composed of three Commissioners is not a true form of appeal. The applicant has not, at this stage, had a hearing in the ordinary sense of that term.

It would appear also that, whatever the efficacy of the present system, it is not designed to leave an unsuccessful applicant with the feeling that he has had a completely impartial hearing. It is recognized that an unsuccessful applicant will not, as a rule, feel satisfied. However, the present system leaves him in a position to attribute the failure, rightly or wrongly, to the fact that the tribunal before which he appeared to "appeal" was not independent of that which considered his claim in the first instance. As a number of those appearing before your Committee stated, it is important not only that justice be done, but

COMMENT

that it appear to have been done. The present system leaves itself open to criticism of this type.

It is noteworthy that almost all those appearing before your Committee on behalf of veterans and members of the Forces were critical of this feature of the present operation of the Commission.

Apart from the merits or demerits of the activities of the Pension Commission, your Committee feels that the circumstance of the same body sitting in appeals from what in effect are its own decisions demands alteration of the present procedure to repose the ultimate authority in a body outside the Pension Commission.

There are additional reasons for such a step. While your Committee received many criticism and constructive suggestions, it is apparent, from the large volume of claims dealt with by the Commission and from statements from many of those appearing before your Committee, that the Commission has, in the overall picture, rendered satisfactory service to the pension applicant.

This is not to deny the validity of the positions taken by those expressing dissatisfaction in some areas. Among these the failure of the Commission to develop a body of rules, decisions and findings for ready reference by applicants looms large. It was pointed out, on behalf of the Commission, that in many instances this very situation reacted in the applicant's favour and your Committee would be loath to see the present course of activities disturbed any more than is necessary. It is your Committee's view that, by leaving the present operations of the Pension Commission in a large measure intact, and by placing the PENSION APPEAL BOARD in a position to develop and publish interpretations and precedents, the situation complained of could be rectified.

COMMENT

It is the view of your Committee that the establishment of an appellate body would effectively destroy the inference that it is difficult, on occasion, for an Appeal Board of the Pension Commission to justify refusal of a pension, even when refusal may be warranted. These Appeal Boards have found themselves in the invidious position of having the system under which they operate criticized, whatever the merits of their decision. Your Committee is not suggesting, nor is there evidence to show, that the present Appeal Boards have been affected by this view. However, even such possibility should not be tolerated.

It is significant, in this entire matter, that the formation of an appellate body separate and apart from the Commission would create a better climate for the handling of complaints where refusal of pension is necessary. An appellate body would not have to operate under the disadvantage of attempting to justify the policies and practices of the Pension Commission, and would be free to adjudicate with the knowledge that, if a refusal of pension is necessary, the applicant while critical of the decision, would not be so critical of the system which produced that decision.

The Committee recognizes that the machinery for adjudication of pensions must provide satisfactory protection against the improper granting of pensions. The problem is to strike an effective balance between the administrative discretion of the pension adjudicators and the individual rights of the applicant. Your Committee is of the view that, under the existing system, the appearance is given that the powers of the Commission far outweigh the rights of the applicant. Your Committee does not suggest that these powers have necessarily been misused. On the other hand, it stands out in bold relief that the procedure under which the

Comment

Commission acts not only as the administrator, but as the judge and jury, leaves much to be desired in the mind of the unsuccessful applicant. He is entitled to ask for what might be termed "an accommodation of his interests" and in some cases a lack of this accommodation may be the sum total of his grievance. If he considers that the system of adjudication failed to allow him proper scope to exercise his rights, the suggestion would presumably follow in his mind that natural justice had not been extended to him. In many instances, this could be his only complaint, and if he were refused pension through a system which he considered to be fair and adequate, there is a strong possibility that he would be satisfied.

Your Committee is mindful that, on two past occasions, there were experiments with appellate tribunals. It is evident that the Federal Appeal Board which operated from 1923 to 1930 suffered because its authority was insufficient to overrule the Board of Pension Commissioners. This resulted in the anomalous situation that the Federal Appeal Board, although constituted as the senior body, could not enforce its decisions. This Board was hampered also by lack of staff with resulting congestion of work.

It would appear that the Pension Appeal Court, which operated from 1930 to 1939, was unable to surmount its difficulties. Presumably its main defect lay in the right of appeal of the Pension Commission. This lead to the situation where virtually every appeal by a veteran was vigorously opposed by the Pension Commission. Few appeals by veterans were successful. This, together with the relatively high number

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of successful appeals launched by the Commission, undermined the confidence of the veteran in the Pension Commission.

Your Committee has attempted to avoid the pitfalls indicated by these previous experiences, and is convinced that a third attempt to set up a strong, independent appellate body is essential. The denial of any right of appeal beyond the Commission, coupled with the Commission's sole right to interpret its own Act, creates a situation which not only invites criticism but which might lead to abuses. The powers conferred have been exercised in a benevolent fashion, in a number of areas. However, they have given rise to concern to veterans organizations, to Members of Parliament and to others who have knowledge of these matters. The recommended provisions for an appellate body should quiet this concern without depriving the Pension Commission of its present effectiveness.

Your Committee notes that the Royal Commission on Government Organization (Mr. J. Grant Glassco, Chairman) made reference to the Canadian Pension Commission in its comments respecting "Licensing, Regulatory and Adjudicative Bodies".

Parts of this report which bear on the subject of your Committee's enquiry are quoted hereunder: ²⁷

The boards commonly regarded as administrative tribunals fall into two general categories in their relationship to the administrative process. One group, including the regulatory and licencing bodies -- the Board of Transport Commissioners, Air Transport Board, National Energy Board, and Board of Broadcast Governors -- and such organizations as the Canada Labour Relations Board and Restrictive Trade Practices Commission, have original jurisdiction. The others are essentially appeal bodies, reviewing prior

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administrative decisions. Sometimes, as in the case of the Pension Commissioners, the disputed decisions are made by the same organization in its administrative aspect; in other instances -- the Tariff Board, Tax Appeal Board, and the Umpire appointed under the Unemployment Insurance Act -- the reviewing body is clearly distinguished from the administrative organization

The status of findings and decisions (of these boards) also varies, with no discernible relationship to the method of appointment or basis of tenure. Decisions of the unemployment insurance Umpire, the Canada Labour Relations Board, the Canadian Pension Commission and the War Veterans Allowance Board are final, but those of the Tariff and Tax Appeal Boards may be appealed to the courts..

In addition, there are variations in the right of appeal to Ministers against the decisions or rulings of the different tribunals. This diversity is further compounded by variations in the working relationships developed over the years between the Boards and their respective ministers....

Finally, there are widespread differences in the procedures followed by the tribunals, either as a result of differing statutory requirements or because of decisions taken by the boards themselves. No uniformity or consistency of principle was observed among them in respect of such matters as the obtaining of evidence and its disclosure to interested parties, the examination of petitioners and witnesses, the publicity given to hearings and other proceedings, and the form and publication of decisions, rulings or reports.

The variations noted above raise a general question: how far should these tribunals, in their status and procedures, be assimilated to the courts? Although they form part of the Executive branch of government, their underlying function has much in common with that of the judiciary; to ensure thoroughness and impartiality in establishing the facts of a case and in reaching a decision.

Consequently, there is relevance in the judicial precept that justice should not only be done but should be seen to be done. What the public interest requires may vary from one board to another, but for each it is proper to ask whether the principles of natural justice should not apply. Moreover, because the tribunals are concerned with the rights and obligations of the citizen, the relevance of the Bill of Rights cannot be overlooked; that it affects judicial attitudes towards administrative tribunals is already evident.

COMMENT

The Royal Commission posed the question: "How far should these tribunals, in their status and procedures, be assimilated to courts?" and commented on the "lack of any consistency in the status, form and procedures of tribunals examined".

The report noted that the matter had been the subject of official enquiries and extensive public discussion in both the United Kingdom and the United States "resulting in a variety of general legislative efforts to establish greater consistency of principle and regulatory of form and practice".

Your Committee did not study the operation of the other tribunals of Federal Governments; nor did it make any "broad comprehensive study in this important field" mentioned in the Royal Commission Report. It did, however, make some examination into the question of administrative tribunals generally, noting that there has been considerable discussion both in Canada and elsewhere concerning their jurisdiction, powers and procedures. It is recognized that, with the growth of these bodies, there is a requirement for protection for the individual against administrative arbitrariness. It would appear, however, that there is a growing tendency to avoid access to the courts as a remedy in regard to appeal from commissions, boards and similar organizations exercising quasi-judicial powers.

The growing importance of these tribunals is reflected in an ever-increasing emphasis upon the study of administrative law in all its facets by Departments of Law in Universities, law schools and students of law.

COMMENT

The first book to be published in England, under the title "Administrative Law", was written by Dr. F. J. Port in 1929. That book was almost exclusively concerned with the judicial review of quasi-judicial and legislative acts of administrative agencies of the Government of England. It dealt with appeals from the decisions of such bodies which were judicial in character. That book and Lord Hewart's treatise he termed "The New Despotism" paved the way for the appointment of the "Donoughmore Committee on Ministers Powers". This Committee gave its report in 1932 in what is known as "Command Paper No. 4060, 1932"

The Donoughmore Committee concluded that the complex modern society made necessary the delegation of semi-judicial powers to such bodies, but warned that the delegation had to be "within certain limits and under certain safeguards" 28

The next enquiry in Britain took place during the years 1956 and 1957. A special Committee, under the Chairmanship of the Rt. Hon. Sir Oliver Franks, was appointed on November 1, 1955, to enquire into and report on "Administrative Tribunals and Enquiries". The Report constitutes Command Paper No. 218, 1957.

The scope and nature of the enquiry is to be found in Sections 5 and

- (5) Our terms of reference involve the consideration of an important part of the relationship between the individual and authority.
- (6) The problem is not confined to this country. In recent years most other western Governments have been called upon to govern more extensively and more intensely, and finding a right relationship between authority and the individual has consequently become a matter of concern on both sides of the Atlantic.

COMMENT

The following excerpt from the Franks Committee report is instructive on the question of giving reasons for refusals to allow appeals or grant re-hearings.

98. Almost all witnesses have advocated the giving of reasoned decisions by tribunals. We are convinced that if the tribunal proceedings are to be fair to the citizen, reasons should be given to the fullest practicable extent. A decision is apt to be better if the reasons for it have to be set out in writing because the reasons are then more likely to have been properly thought out.

On the question of appeal and judicial review the Franks Report states as follows:

103. Most of the evidence which we have received has stressed the desirability of some form of appeal from tribunals of first instance, and many witnesses have advocated that at some stage there should be an appeal to the Courts.

Section 104 deals with the merits of a right of appeal.

104. The existence of a right of appeal is salutary and makes for right adjudication. Provision for appeal is also important if decisions are to show reasonable consistency. Finally, the system of adjudication can hardly fail to appear fair to the applicant if he knows that he will normally be allowed two attempts to convince independent bodies of the soundness of his case.

The Franks Committee, as noted by some of the authorities cited below, rejected the machinery of judicial review, and its findings were endorsed by the Government. The Committee did recommend that a "Council on Tribunals" be set up to maintain the constitution and working of tribunals under constant review. ²⁹

The British Government gave the Report careful consideration and decided to accept the recommendation of the appointment of a "Council on Tribunals". In 1958 an Act was enacted entitled "Tribunals and Inquiries Act". ³⁰

COMMENT

Section 1 read as follows:

- 1 (1) There shall be a council, entitled the Council on Tribunals.
- (a) To keep under review the constitution and working of the tribunals specified in the first schedule to this Act, and from time to time to report on their constitution and workings.
 - (b) To consider and report on such particular matters as may be referred to the Council under this Act with respect to tribunals, other than the ordinary courts of law, whether or not specified in the First Schedule to this Act or any such tribunal.

Section 9 provides that, in the case of specified tribunals, anyone "dissatisfied in point of law" with a decision, may appeal to the High Court or require the tribunal or Minister to state a case for the High Court.

Section 12 stipulates that a tribunal or Minister must give reasons for a decision if requested to do so.

United Kingdom Provisions

Your Committee examined the pension system in the United Kingdom, which provides for an appeal to the Courts under the Pension Appeal Tribunals Act of 1943 and 1949. This legislation provides for Pension Appeal Tribunals to hear appeals against decisions of the Ministry of Social Security * on questions of pension entitlement and assessment. These Tribunals are composed of three members, appointed under judicial authority. These Tribunals differ from courts in that they are not bound by strict rules of evidence, and testimony is not given under oath. The hearings are on an informal basis and are of an adversary nature, in that

* Formerly known as Ministry of Pensions and National Insurance

COMMENT

a representative of the Ministry is present with the case records. The appellant may be represented by an ex-servicemen's association, a trade union, an attorney or a private individual.

Tribunals which deal with pension entitlement are composed of a barrister or solicitor who acts as Chairman, a qualified medical practitioner and an ex-serviceman or woman. Appeals in regard to entitlement for a disability may be taken to an entitlement tribunal where the issue involves a question of attributability or aggravation by service, or serious negligence or misconduct. The issues which can be appealed to Tribunals in death cases follow from an unfavourable decision involving the issues of attributability or aggravation only.

The decision of an entitlement tribunal is final except that the appellant or the Ministry may appeal on a point of law, provide leave to appeal is granted either by the tribunal or the court.

Assessment tribunals consist of two medical practitioners and an ex-serviceman or woman. These tribunals have jurisdiction over appeals involving matters of the assessment of the degree of disability. The decision of an assessment tribunal is final and conclusive.

The Pension Appeals Tribunals Act of 1943 and 1949 provide that in England and Wales appeals on entitlement cases will be heard by a Judge of the High Courts, nominated for this purpose by the Lord Chancellor. In Scotland, the appeal is to the Court of Sessions, the decision being made by not less than three of the four Judges who constitute one of the two divisions of the Court. In Northern Ireland, the appeal is to the Supreme Court.

COMMENT

The Ministry is represented by counsel. The appellant may be represented by a barrister who may be commissioned by an ex-serviceman's organization at no expense to the appellant or the appellant may present his appeal or application in person if he so wishes. The Court may either issue its decision in the form of an Order or may remand the case back to a tribunal for disposition.

Board of Veterans Appeals: United States

Your Committee also reviewed the operation of the Board of Veterans Appeals in the United States. This Board's jurisdiction extends to all questions on claims involving benefits under laws administered by the United States Veterans Administration. The decisions of the Board of Veterans Appeals are final, except that claims involving insurance contracts are subject to court review.

The principle function of the Board of Veterans Appeals is to consider applications on appeal, to conduct hearings, to evaluate the evidence of record and to enter decisions in writing on questions presented on appeal. An appeal may be filed by a claimant or his authorized representative.

Appeal from a decision of the agency of original jurisdiction may be filed by officials of the Veterans Administration in order to resolve a conflict of opinion concerning a question on a claim involving benefits.

A claimant will be accorded full right to representation in all stages of an appeal by a recognized service organization, attorney or agent or other person authorized to represent him. A hearing on appeal

COMMENT

shall be granted where a claimant or his representative express a desire to appear in person. The purpose of such hearing is to receive argument or testimony. These hearings are non-adversary and cross-examination by parties to the hearing are not permitted. The proceedings are not limited by legal rules of evidence. The hearings are held either in Washington, D.C., or before a travelling section of the Board of Veterans Appeals. The proceedings at these hearings are recorded and a copy of the complete transcript incorporated as a permanent part of the claims record. In some instances appropriate personnel in a Veterans Administration regional or other office nearest the claimant's residence may be appointed to act as a hearing agency for the Board of Veterans Appeal.

Where a decision is simultaneously contested by both an applicant and the Veterans Administration the attendance of the other contesting party may be permitted at the hearing of the first party, but such representative may not participate. Alternatively, the other contesting party is notified in writing of the substance of the argument or testimony in refutation and a separate hearing for the other contesting claimant will be scheduled for such purpose, if requested.

Where the members of a section of the Appeal Board are in unanimous decision, such shall be the final determination of the Board. Where the members do not agree the Chairman of the Board may either concur with the majority, in which event such constitutes the final determination of the Board, or he may direct further consideration by two or more sections.

When during the course of review it is determined that further evidence or clarification of the evidence is essential the Board may

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remand the case to the agency of original jurisdiction, directing further investigation to be undertaken. If the benefits appealed for are not granted on such review by the agency of original jurisdiction, the matter is returned to the Board of Veterans Appeal for appellant review.

Your Committee reviewed the situation respecting the Canadian Pension Commission in the light of the report of the Royal Commission on Government Organization and in the light of the Pension Commission's background of experience with particular emphasis on the question of the right of an appeal from the decisions of the Canadian Pension Commissioners.

Regarding the question of appeal to the courts, your Committee noted the findings of the Veterans Affairs Committee of the House of Commons of the 1963 Session.

This Committee reviewed Bill C-7 - an Act to amend the Pension Act (Judicial Appeal) which had been proposed by Mr. Jack McIntosh, M.P., Swift Current, Saskatchewan. The purpose of this Bill was, as set forth in the explanatory notes thereto as follows: 31

The purpose of this Bill is to give an applicant for a pension under the Pension Act the right, where the Pension Commission or an Appeal Board has ruled against his or her entitlement, to have the decision reviewed by the Courts:

- (a) on any question of law respecting the interpretation of the Pension Act; and
- (b) on those controversial issues of fact which must be weighed, as the courts are used to do, in the knowledge of human conduct and intention. An ancillary purpose gives the Commission itself the right to refer any question of law to the Supreme Court of Canada.

COMMENT

The Bill applies to the Pension Act that principle of the Rule of Law that, to the degree most possible, the decisions of an administrative tribunal or commission which touch the person, or property or rights of an individual should be subject to review by the Courts. The United Kingdom has applied this Rule of Law to as many of its boards, tribunals and commissions as possible in the Tribunals and Inquiries Act, 1958.

The Bill proposed an appeal to the court of appeal in the province in which the applicant resided, on leave of a Court of Appeal judge.

The Parliamentary Committee did not recommend the adoption of Bill C-7 in its report to the House of Commons. It did, however, make the following recommendation in regard to appeals: 32

(10) Your Committee further feels that instead of a "one shot" appeal which is both final and binding, there should be two appeals as follows:

- (a) A preliminary appeal in which all the evidence is transcribed and then ruling is given in the form of a written judgment in which all points of evidence, both medical and legal or which the ruling is based is set forth in writing and signed.
- (b) A second ruling as at present. Your Committee recommends that this procedure would correct the disadvantage the veteran now suffers as he would know what arguments must be rebutted instead of having to prepare his appeal blindly as at present.

The question of an appeal to the courts in regard to pension applications was considered. This brings to the fore a number of important considerations. In the first place, none of the delegations appearing before your Committee was prepared to recommend such provision. In fact, in so far as your Committee could learn, veterans

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appear to have an aversion to referring pension matters to the courts. Moreover, pension matters have developed in their own way as it were for so long that a special kind of expertise has evolved.

The chief complaint made to your Committee in regard to the existing procedure was that the personnel comprising the appeal body were chosen from the Commission which has the responsibility for initial adjudication, and for administration of the Act. Hence, your Committee considered that the major flaw in regard to pension appeals could be overcome by the establishment of a separate appellant body, independent of the Minister of Veterans Affairs but to be operated under his departmental jurisdiction.

Therefore, its recommendation is limited to the establishment of an appellant procedure represented by the institution of an independent appeal body which could be effected with only minor disruption of existing procedures.

COMMENT

In this regard, your Committee has considered that, with the objective in mind of furnishing an administration which avoids both political control and freedom from such restrictions as might be imposed by judicial access, the simple alternative is the establishment of an appeal system which could avoid the more stringent procedures of a court but which at the same time would meet the existing dissatisfaction which arises in an administrative system in which there is no appeal except to persons who comprise the administrative body.

The proposed Pension Appeal Board, in providing a means of appeal beyond the Pension Commission, appears to answer the major criticism with respect to administrative tribunals which was raised in the report of the Royal Commission on Government Organization.

The proposed Pension Appeal Board would not come under the direct control of a supervisory body or would not have reference to any judicial body. Your Committee considers however that, because past history indicates that our pension legislation does not lend itself to interpretation by the courts and because of the peculiar nature of pension legislation as described, your Committee considers that the reposing of final authority in the hands of this Pension Appeal Board is fully justified.

Hence, it would now appear both practical and necessary that the existing appeal procedure represented by travelling Appeal Boards, should be regarded as they really are, that is, a means by which an applicant for pension can receive a personal hearing, with supporting witnesses.

There are at present no true appeal provisions.

COMMENT

This system of personal hearings is not designed to, and never did represent, an appeal in that previous adjudications were based merely on a review of available documents. Under the proposed changes, this "hearing" by a quorum of Commissioners would represent the final step in the adjudication process within the Commission.

The continued use of Commissioners for these hearings would provide the means of handling the bulk of applications for pension, and would leave further consideration to a true appellate tribunal. The Pension Appeal Board would constitute a court of final instance, charged with the responsibility to:

- (a) Make a final decision on pension applications and other claims and complaints respecting pensions; and
- (b) Act as the final interpreter of the Pension Act.

It is not intended that the Pension Appeal Board operate as a court of law. The members would not have the status of judges and would not be required to follow strict rules of evidence or procedure. The proceedings of the Board would be non-adversary in character and, on occasion, would permit review on the basis of the written record.

The Board would be able to make use of expert medical and legal opinions, always subject to the proviso that such opinion must be in writing and must be available for examination by the appellant and his representatives.

The gist of the recommendation is that the procedure be amended to provide that the Commission provide initial adjudication in the form of a review of documents, followed by a form of personal hearing, to be

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carried out by the Commission personnel. This procedure would apply to what is known as entitlement claims and, in some instances, to compassionate awards.

In addition, there should be a form of simplified personal appearance of an informal nature, to provide a means of handling complaints in respect to other matters including discretionary awards, assessment and degree of aggravation.

Following consideration and adjudication by the Pension Commission there would be recourse to the Pension Appeal Board. The procedure for this Board should provide initially for a review of the record. This would make it possible to dispose of those appeals which it was prepared to allow, without further representations.

In other cases it would arrange for a personal hearing, either where required, or where in its discretion the Board felt such a hearing desirable. It is suggested, of course, that not all appeals could proceed without leave and, in instances where a personal appearance was not mandatory, the Board would have the right to dismiss the appeal, after review of the written record and submissions.

Time Limit for Applications

Your Committee considers that, once the Pension Appeal Board is in operation, there should be a one year time limit (except with leave of the Board) by which applications in regard to both entitlement and discretionary matters must be placed before the Board. The proposal that no time limit be instituted in regard to matters upon which the

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Pension Commission has made a decision prior to the coming in to being of this Board is intended to:

- (1) Permit appellants from long outstanding cases sufficient time to have their cases prepared; and
- (2) Avoid an immediate rush of appeals involving outstanding cases which might otherwise result if the one year time limit were to apply to them.

Pension Appeal Board Procedures

Your Committee has purposely suggested a wide discretion for the Pension Appeal Board in regard to which cases it should consider, and in regard to which method it should follow in giving consideration to a case. The Committee's proposal is that an application may be made to the Board in respect of an entitlement claim as a matter of right. An application in respect of assessment, degree of aggravation or other discretionary matter may be heard with the leave of the Board, and such leave may be decided by the entire Board or by any member thereof as the Board may specify.

It is appreciated that, in opening the door to appeals in so many matters, the Pension Appeal Board could well find itself swamped. However, the recommendation which provides for the granting of leave in other than entitlement appeals should enable the Board to limit to workable numbers the appeals where leave is granted.

It is appreciated also that only experience can ultimately dictate the extensiveness to which these provisions will apply in a practical manner. This is a matter which will have to be worked out by the Board itself, but your Committee considers that it is imperative that all matters be placed on a footing of similar ultimate recourse. It follows that

COMMENT

the powers granted to the Board must be sufficiently extensive to allow for all developments necessary to effectuate this end.

The Board should have further discretion in whether an appeal can be handled by a review of the written record or alternatively, by means of a hearing de novo; that is, a sitting of the Board at which the appellant and his witnesses and those representing him can place before the Board all information relevant to the claim.

Your Committee appreciates that there could be some misunderstanding regarding the proposal that the Board should be empowered to review the written record, including the appellant's file held by the Pension Commission. Under existing procedure, all of the information on his file is available to the Commission. It is also available, with consent of the applicant, to the Veterans' Bureau of the Department of Veterans Affairs, or to representatives of veterans organizations appointed by the veteran to advance his claim. In the procedure proposed in this recommendation it is felt that such Board should have access to all available knowledge on the case. Should the file contain information which may be damaging to the claim, those representing the veteran will have an opportunity to rebut or explain such information.

It is possible that, in view of the proposed disclosure of the contents of a Commission file to the Pension Appeal Board, officials of the Pension Commission or other Government departments, in the course of their professional or official duty, may become overly-cautious in writing material which, by its nature, would become part of the record. This could be particularly true where doctors or other officials in the honest pursuit of their duty would wish to express opinions in their reports which may be derogatory or even defamatory.

CONTENT

Your Committee considers that this possibility will have to be met. A public servant is obligated to produce written records of an accurate nature, and while such may be unfair to the applicant and may be prejudicial to his case, the Pension Appeal Board must be expected to deal with such statements in a fair and impartial manner; and must be prepared also to respect any confidential aspects thereof.

In view of these reasons, your Committee has no hesitation in suggesting that the applicant's Commission file should be made available for review by the Pension Appeal Board. Any other course could well mean that the Board would not have full disclosure of information. It is essential to the success of any such Board that all information, whether it is for or against the applicant's claim, should be placed in front of the body given responsibility for a final decision in the case.

Your Committee has been interested in another aspect concerning availability of files. It is the practice in the Canadian Government that public access is denied in connection with files upon which administrative decisions are based. In certain circumstances these files are available to the Veterans' Bureau and to representatives of veterans organizations. Your Committee considers that if the Pension Appeal Board is to represent properly the interests of the applicant, as well as those of the Crown, it must have the right to examine all official documentation in the hands of the Government.

Pension Commission not to Appear Before Board.

In the Committee's view Canadian pension legislation for death or disability of members of the Armed Forces has been directed towards giving the applicant the benefit of the doubt and recognizing the limitation of facilities at the command of the applicant through his own resources.

COMMENT

It has accordingly provided assistance through bodies such as the Veterans' Bureau of the Department of Veterans Affairs.

Administratively, there has been established a system by which the enquiry into the applicant's claim has avoided all appearance of antagonist proceedings. Previous experience indicates also that, when the Pension Commission had the right to appeal (Federal Appeal Board and Pension Appeal Court) the antagonist feature of the proceedings appeared and the Pension Commission, with its centralized and extensive resources had an advantage which showed up in the large numbers of appeals in which it succeeded.

Your Committee feels that the spirit and background of the legislation, and the requirements of the present situation, make it undesirable to have appeals to the Pension Appeal Board by the Pension Commission. Such procedure would only harm its image.

In considering the practicability of the Pension Appeal Board dealing with a large volume of cases on the written record, it is pointed out that your Committee's recommendations regarding entitlement boards and 7(3) hearings provide that evidence will be recorded. Hence, the Board would have this evidence available for review.

The recommendation of your Committee provides that the Pension Commission's reasons for refusal of a claim shall be made available to the Pension Appeal Board in the form of its findings in regard to previous adjudication, as set out in the file, with the additional proviso that the Commission shall be permitted to file the written reasons substantiating these findings, should it desire to do so.

COMMENT

Undeniably, the Commission has some responsibility to ensure that a pension claim is valid. In this respect Section 59(1) of the Act requires the Commission to: "Collect such relevant information, if any, as may be available in the records of any department of the Government of Canada, and make, through its medical and other officers, such enquiry as appears advisable into the facts upon which the application is based".

This empowers the Commission, in the first instance, to secure not only the information in support of the claim, but also any information which may indicate that the veteran has no claim to pension. Any information so secured will be on the file.

In respect of the Commission's findings on previous adjudications, Sections 59(2) and 60(1) of the Act provide, in regard to a first application, that the Commission shall "notify the applicant, in writing, of its decision, stating fully the grounds therefor". Similar provisions exist in regard to second and subsequent hearings.

The Act contains a further provision under which the file will contain the views of the Commission. In this respect your Committee refers to Section 66 which provides that on the refusal of any pension, a form shall be placed on the file of the member of the Forces by or in respect of whom application for pension has been made bearing the personal signature of at least one of the Commissioners and containing the following information:

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- (a) The names of the Commissioners dealing with the case;
and
- (b) The grounds on which pension is awarded or refused,
specifying:
 - (i) the medical classification of the injury or
disease causing the disability or death in res-
pect of which the application has been made,
 - (ii) the medical classification of such injuries or
diseases as have been dealt with by the
Commission in connection with the application, and
 - (iii) whether the injury or disease resulting in di-
sability or death was or was not attributable
to or incurred during military service or
whether it pre-existed enlistment and was or
was not aggravated during military service; and
- (c) in the event of a disagreement, the grounds on which a
Commissioner disagrees with the decision reached.

In view of the foregoing information, your Committee considers that the Pension Commission has a full opportunity under the Act to ensure that its views regarding any previous adjudication will be on the record, and thus be available for review by the Pension Appeal Board. Notwithstanding, your Committee considers that the Commission should be given an opportunity to make written submissions in further support of these views. This would ensure that the Commission's position in any case would be made clear before the proposed appellate body.

It is recognized that in both the British and United States pension appeal system, provision is made for an administrative appeal to be filed by representatives of the government agency authorized to administer pensions. Your Committee considers that there is no valid reason for doing likewise in the Canadian pension system. In particular, your Committee has had to take note of the extreme difficulties which arose in the experience of the pension appeal bodies in Canada in past years.

COMMENT

It is considered that, for this reason, the applicant in Canada should not be subjected to the possibility of adversary proceedings developing, as such could only lead to dissension and conflict, neither of which should be part of the administration of pensions which are awarded where the member of the Forces has suffered death, injury or disease resulting from service to his country.

Pension Commissioners May Be Appointed To Board

The operations of the Pension Commission have developed into a specialized activity, involving both law and medicine extensively. Accordingly, a new appellate tribunal could be lacking in the background necessary to review effectively Commission decisions. The Committee considers, therefore, that it would be both proper and wise that persons with experience as members of the Pension Commission shall be available for appointment to the Pension Appeal Board, especially in its early stages. Their numbers should be limited, however, and at no time should a majority of the members of such Board be composed of former Commissioners. The salary level of Board members should be higher than that of Pension Commissioners.

Composition of Board

In view of the nature of the problems which would come before the Pension Appeal Board it would seem desirable to have both medically-trained and legally-trained members on it. Your Committee is not of the view, however, that these should be established in any definite proportion. Neither does your Committee consider that legal or medical training should be regarded as the primary qualification for any Board member. While a legal or medical background could provide a useful fund of knowledge and experience for a Board member, no member of the Board

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should, while performing his duties, as such, regard himself as a lawyer, physician or member of any other professional group.

Your Committee desires to make a special observation in regard to the proposal that members of the Pension Appeal Board should be appointed in the same manner as members of the Pension Commission.*

It is understood that there are two methods by which the Chairman and Members of a Board of this nature could be selected. One would be by Civil Service competition; the other by Governor-in-Council. Your Committee has favoured the latter method, as it is felt that the procedure for such appointments should be sufficiently flexible to permit the selection of able personnel, which selection may not be fully possible if these appointments had to be made through a formalized procedure as provided for in Civil Service appointments.

Your Committee realizes, at the same time, the inherent dangers in a procedure which permits appointments where the qualifications of candidates do not have to meet any standard specifications, as they would in Civil Service appointments. These dangers are far out-weighed by the necessity to remove any potential restriction on eligible appointments and your Committee holds the view that no problem need arise in this area if the Government is sufficiently impressed with the importance of the task of this Board to ensure that the only criteria in selecting its personnel will be whether or not they are qualified to do the best possible job. It must be recognized, however, that serious difficulties could develop if the Pension Appeal Board became a haven for individuals

*See Paragraph "S" of Recommendation No. 14 on page 81 hereof.

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who were seeking a sinecure or who, for other reasons, were not qualified to perform usefully on the Board.

Your Committee's survey indicated some serious and deeply-rooted problems in the administration of this Act. The solutions to these problems will, in large measure, lie in the acceptance of the Committee's recommendations in regard to legislative changes and revisions in administrative procedures. Your Committee considers, however, that an essential element in any remedy to these problems will be the effective operation of the proposed Pension Appeal Board in its dual role of appellate body and final interpreter of the Act. Your Committee therefore has no hesitation in stating that if the results of its work are to be successful, the appointments to this proposed Pension Appeal Board must be made solely on the basis of qualification for the task at hand.

Board to Have Investigatory Powers

In order to pursue its task successfully, the Board must be given full powers of investigation. The Board must be "the master of the instruction of the case" and must be empowered to seek out all facts, and to obtain such opinion as might be helpful in deciding an issue. In the case where either party has, in the opinion of the Board, failed to build up sufficient evidence, the responsibility will lie with the Board to seek confirmatory or new evidence.

Medical Advice

The answers to involved medical and legal questions should be available through advisers, and ample provision should be made for these.

COMMENT

The recommendation of your Committee to the effect that medical advice should be available to the Pension Appeal Board through the means of a Medical Advisory Panel is based on the premise that the Board should avoid the situation where consultation and advice in medical matters is always received from the same personnel.

A permanent advisory staff has the advantage of stability and continuity. The Pension Commission has such a staff at present rendering excellent service, in the view of your Committee. On appeal, however, where normally matters of difficult and even controversial nature are considered, your Committee feels that there should be available the widest variety of background, knowledge and specialization. Accordingly, your Committee does not envisage a full time, permanent medical staff for the Board.

Here again only experience can dictate the detail of the requirements of the situation, but your Committee does feel that there should be some system of rotation or periodic change, so that particular points of view will not become entrenched in the Appeal Board operation. It is the view of your Committee, however, that in this area as in others, the Pension Appeal Board should have a wide discretion so as to enable it to take full advantage of personnel available, as well as to benefit from its own experience.

The recommendation suggests that this Medical Advisory Panel could give opinion on written questions concerning the interpretation of medical evidence. This would allow the Pension Appeal Board to make written submissions to acknowledged medical experts who could study the submissions and write an opinion on them. This opinion could then be made

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available for examination by the applicant or his representative, or by the Pension Commission.

It is not deemed practical to establish a provision whereby such medical experts could be called as witnesses, or could be subject to a cross-examination, in that medical personnel of the type envisaged in this proposal would not be able to devote time to make a personal appearance before the Court. In proposing that their opinions could be available for examination, however, your Committee does consider that sufficient provision is being made for those representing the applicant, or for the Pension Commission, to inform themselves regarding any medical advice which has influenced the Board in a decision involving an area of medical conflict.

Legal Advice

As to the suggested Legal Advisory Panel, the Board should once again be given a wide discretion. There may well be a place for Board counsel and solicitors.

On matters involving legal interpretation of sections of the Statute, however, the Board should be free to secure help and advice from the best available sources. The responsibility as the final arbiter of the Act places heavy demands upon the proposed Pension Appeal Board in a legal sense. One of these is that it build up a body of precedents concerning the Pension Act.

In relieving the Pension Commission of this final responsibility, and placing it in the hands of an appellate body, your Committee is of the view that adequate legal advice should always be available; hence the proposed legal advisory panel. .

COMMENT

It is your Committee's view that the Commission has not fully lived up to its responsibility in this regard. Few portions of the Act have been given a definite Commission interpretation and there is little evidence of any attempt to give legal interpretations to the Act. The Commission has taken the stand that each Commissioner should in each instance, decide the meaning of the Act and how it should apply in each particular case.

Outside of the Commission there can only be uncertainty. This obviously affects those who must represent the pension applicant.

The Commission is of the opinion that this has been done in the interest of the applicant. In other words, giving each Commissioner the maximum freedom of operation enables him, in his discretion, to deal with what he considers to be the merits of the instant case. If the validity of this point of view is accepted, it suffices only for the day-to-day operations of the Pension Commission. Somewhere there should be available a tribunal that will give answers on questions of principle and interpretation. Your Committee does not see how this could be established within the Commission without depriving its work of much of its present value. Hence, the recommendation is made that the responsibility for final interpretation rest with the Pension Appeal Board, and that this Board have access to legal opinion through the proposed Legal Advisory Panel or such other means as the Board may decide.

It appears essential, also, that the Pension Appeal Board be given the power of final interpretation. It seems obvious that if those powers were left with the Commission, the situation would develop where the Pension Appeal Board could be overridden by the Commission.

COMMENT

As with the proposed Medical Advisory Panel, the opinion secured by the Board through any legal advisers should be subject to examination by the veteran, those representing him, or by the Commission.

Your Committee considers it essential that the Board be given authority to seek out the best procurable opinion in the medical and legal fields, and that, to this end, the Board should not be hampered by normal government restriction as to fees, so long as the Board will accept responsibility to ensure that such fees are within reason and its budget.

Board to Have Power to Implement

The Pension Appeal Board should have the power to implement its decisions. In other words the delay incident to reference back to the Pension Commission should be avoided, and the possibility of conflicting orders from the two bodies must be circumvented.

It should be made clear that orders of the Pension Appeal Board supercede those of the Pension Commission. Generally speaking, the Pension Appeal Board should not have the power to decrease awards but only the power to affirm or increase awards. It should also have the power to fix time limits of general application or in specific cases within which its awards may be reduced by new decision of the Commission. In all instances, however, the Commission should have the right to refer cases falling within these limits to the Pension Appeal Board for further ruling should circumstances in the case change.

Time Limits for Decision by Board

A potential problem exists in the establishment of appellate machinery, in that a case could conceivably be subject to lengthy delay. Accordingly, your Committee considers it essential that, under normal

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circumstances, the Pension Appeal Board should be required to reach a decision within 30 days, where a case is handled on the basis of a review of the record, 60 days where a representative appears, and within six months if a hearing is held. Provision is made for an extension of time where the Board must necessarily reserve its decision, but the limit of six months must be adhered to.

These time limits would, in the opinion of your Committee, do much to eliminate delays which might otherwise destroy the effectiveness of the appellant machinery. They should also provide a basis upon which the Chairman of the Pension Appeal Board can insist upon provision of sufficient staff to ensure an effective operation.

Provision Where Appellant Unable to Appear

Your Committee visualizes a small number of instances where an appellant is ill or, for other reasons, it is not considered feasible by the Board that he could make a personal appearance. Accordingly, your Committee has suggested an informal arrangement which would permit one member of the Board to interview the appellant and take his evidence. This would also permit a representative of the Pension Appeal Board to interview the appellant in person, and report the matter to the Board for its consideration. This procedure would only be used at the request of the appellant. This procedure could be used for appeals from persons residing outside of Canada.

COMMENTStaff and Accommodation

Your Committee considers it important that the administrative and other personnel, other than those engaged in routine and clerical positions, should not be part of the Public Service of Canada, and that the Board and its staff should be housed in accommodation other than that occupied by the Canadian Pension Commission.

Advantage should be taken of every possibility to ensure that the impression exists that the Pension Appeal Board is separate and apart from the Commission and from the Minister of Veterans Affairs.

Your Committee is aware that staff appointments could be made either through the Civil Service Commission or by the Board itself. Undoubtedly, there is a possibility, as with the appointment of members of the Board, that these staff positions could fall to persons in fulfillment of a debt of gratitude, rather than on the basis of qualification. Your Committee is of the view that, notwithstanding this danger, the Board should be able to select personnel other than routine and clerical without the restriction of normal Civil Service competition, but it must necessarily use its discretion in this respect wisely, to ensure that staff members of the highest possible calibre are appointed.

The proposal to the effect that the Board should be given authority to select its own staff is somewhat unusual. Your Committee is convinced, however, that the necessity for effective appellate machinery justifies this course and the objective, in the main, is to permit the establishment of an administrative tribunal which is as independent of Government association as may be possible under the circumstances.

COMMENT

The Pension Appeal Board will be faced with a difficult task, particularly during its organization phase. In view of this your Committee considers that the Board should be given a completely free hand in the selection of its senior staff members. The Board should be able to select the best available personnel for the task without the necessity of adhering to standards which would presumably be the case if these appointments were made through the Civil Service Commission. This is not to suggest any criticism of normal Civil Service standards which, in the view of your Committee, compare favourably with any type of employment in Canada and which undoubtedly are most satisfactory for the purpose. Your Committee believes, however, that insistence upon such standards might conceivably hamper the Pension Appeal Board, particularly in as much as its senior staff would require special selection on an urgent basis.

Your Committee has considered also the possibility that, through Civil Service competition, personnel who are now employed with the Pension Commission might qualify for senior staff posts with the Pension Appeal Board, without the sanction of the Chairman and Members of that Board. Undoubtedly there are a number of executive personnel with the Commission who could render excellent service to the proposed appellate body. Your Committee feels, however, that such personnel should become members of the Pension Appeal Board staff only if the Chairman and Members of that Board desire this. The provision that the senior staff members could be appointed by the Board does not automatically eliminate the possibility of the appointment of such persons. It does, however, ensure that they could be appointed only under the authority of the Board.

COMMENT

In suggesting that the senior staff appointments should be made by the Pension Appeal Board, your Committee is following the practice which appears to be universal in regard to the operation of agencies which have, in a sense, the role of the defender of a citizen's rights. In this regard it is noted that the staff of the office of Ombudsman in the Scandanavian countries, and that of related institutions in other countries, are left as the direct responsibility of the chief executive of the agency concerned.

The senior staff positions for the Board should be paid at a rate which is commensurate with similar occupations in the Civil Service, but the actual rate of remuneration should be fixed by the Governor-in-Council, on recommendation of the Board. These senior staff appointments should be accorded all the benefits of the Civil Service Act, except salary as a Civil Servant.

The routine administrative and clerical staff should be appointed under and pursuant to the provisions of the Civil Service Act and such staff should be appointed by the Civil Service Commission and made available to the Board as required.

APPEALS

REFERENCES

1. Proceedings of Committee Sessions, Volume I, Pages F-15 to F-19.
2. Proceedings, Standing Committee on Veterans Affairs, 1963, Page 252.
3. Ibid, Page 255.
4. Submission by the Royal Canadian Legion, December 6, 1955.
5. Proceedings of Committee Sessions, Volume III, Page L-3.
6. Ibid, Volume III, Page L-3.
7. SC. 1919, C-43, Assented to July 7th, 1919.
8. Order-in-Council, PC. 1525, July 22nd, 1922.
9. Report, Royal Commission on Pensions and Re-establishment 1922-24, Sessional Paper 154a, Page 12.
10. Ibid, Page 16.
11. SC. 1923, C-62, Assented to June 30th, 1923.
12. Report, Department of Pensions and National Health, for year ending March 31st, 1929, Page 66.
13. Ibid, Page 68.
14. SC. 1930, C.35 Assented to May 30th, 1930.
15. SC. 1930, C.35 Assented to May 30th, 1930.
16. Order-in-Council, P.C. 1741, August 4th, 1932.
17. Committee Appointed to Investigate into the Administration of the Pension Act.
18. Report, Committee Appointed to Investigate into the Administration of the Pension Act, Pages 6 to 10.
19. Ibid, Pages 34 to 37.
20. Ibid, Page 40.
21. Ibid, Page 69.
22. SC. 1933, C.45 Assented to May 23rd, 1923.
23. SC. 1939, C.32 Assented to May 13th, 1939.
24. Proceedings of Committee Sessions, Volume VII, Page MM-19, (Mr. Decker)
25. Ibid, Volume VII, Page MM-21 (Mr. Power)
26. Canadian Pension Commission Memoranda dated Feb. 15, 1966 and Feb. 21, 1967
27. Report, Royal Commission on Government Organization, Volume V, Pages 72-75.
28. Report, Donoughmore Committee, Command Paper 4060, Page 397.
29. Report, Franks Committee, Command Paper 218, 1957, Page 10.
30. 6 and 7, Elizabeth II, Ch. 67, 1958.
31. House of Commons Debates, 1962, Volume II, Page L758.
32. Proceedings, Standing Committee on Veterans Affairs, 1963, Page 430.

CHAPTER 5

ENTITLEMENT BOARDSGENERAL

Your Committee heard a number of specific complaints concerning the procedure of Appeal Boards. This report recommends that the name of Appeal Boards be changed to Entitlement Boards* and that the responsibility for appeal be transferred to an appellate body.**

Appeal Boards as now constituted would continue to function under the new name of Entitlement Boards. Inasmuch as they may no longer represent the last resort of the applicant, these complaints would not seem as serious as under the present procedure. It is none the less necessary to consider the complaints which have been placed before your Committee, relative to the procedures of the present Appeal Boards.

Complaint: Consent for Commissioners to adjudicate
upon application where such member has
previously dealt with the case.

The relevant sections of the Act are:

60(5)(c) that no member of an Appeal Board of the Commission shall adjudicate upon any case coming before an Appeal Board pursuant to this section, if such member has previously sat as a member of the Commission at any hearing of such case, as herein provided, unless the applicant's consent thereto has first been obtained.

62(5) no member of an Appeal Board of the Commission shall adjudicate upon any case coming before an Appeal Board pursuant to subsection (6) of Section 59, if such member has previously sat as a member of the Commission at either first or second hearing of such case, except that such member may adjudicate upon any case in which the applicant's consent thereto has first been obtained.

* See Recommendation No. 13, Volume I, Chapter 4, page 77
 ** See Recommendation No. 14, Volume I, Chapter 4, page 77

REPRESENTATIONS AND EVIDENCE

It was pointed out to your Committee that those provisions led to inconvenience and injustice to the applicant. This situation placed the veteran on the horns of a dilemma. He had to choose between a commissioner whom he might suspect of bias, and long delay.

The Royal Canadian Legion brief¹ suggested that a particular difficulty arose in this regard when the applicant was not informed that a commissioner was ineligible to adjudicate prior to the time appointed for the hearing.

The Commission Chairman pointed out² that prior to Appeal Board hearings the District Pensions Advocate was notified as to the names of the commissioners who had given previous adjudication on the cases up for review. This information would be passed on to the applicant through the Veterans' Bureau in order to obtain his consent before an otherwise ineligible commissioner could hear the case.

Both the Royal Canadian Legion and the Veterans' Bureau³ stated that, notwithstanding notification from the Commission, it could happen that a veteran might not be given advance notice that his consent was necessary for an ineligible commissioner to hear an appeal, where substitution of a commissioner on an Appeal Board was made on short notice due to illness or other commitment.

The observations of veterans groups in regard to this situation are summarized as follows:

- (a) Where, for any reason, a veteran was asked to give consent on short notice, he is placed in a position of disadvantage. Firstly, he may well consider that if he were to refuse to give consent, such refusal would be taken into consideration when his claim is adjudicated.

Representations and Evidence

- (b) Secondly, he is faced with the certain knowledge that if he does not give consent, a delay (which may be as long as six months in smaller districts) will occur before his case can be heard.

Complaint: In accordance with the interpretation of the Commission, a commissioner who had written a decision on a previous case was not considered as ineligible to sit as a member of an Appeal Board hearing such case at the appeal level.

The relevant section of the Act is quoted hereunder:

66. On the approval of the Commission or of an Appeal Board thereof of the award of any pension or of the refusal of any pension, a form shall be placed on the file of the member of the forces by or in respect of whom application for pension has been made bearing the personal signature of at least one of the commissioners and containing the following information.

- (a) the names of the commissioners dealing with the case.

Sections 60(5)(c) and 62(5) of the Pension Act as quoted above, have a bearing on this aspect of ineligibility of a commissioner to sit on an appeal, wherein such sections state that no member of an Appeal Board shall adjudicate upon a case in which such member either "sat as a member of the Commission at any hearing of such case" or "sat as a member of the Commission at either first or second hearing of such case".

It is the acknowledged practice of the Pension Commission to permit a commissioner who previously had written an unfavourable decision to sit on an Appeal Board considering the case at the appeal level. In this somewhat curious situation arises due to the policy of the Commission which provides that the only commissioners who are barred from sitting at appeal in accordance with Section 60(5)(c) and 62(5) are those who actually sign the refusal form to which reference is made in Section 66.

Representations and Evidence

In the daily routine of the Commission, decisions at any level below appeal are written by single commissioners who then pass the file to what is known as the "daily meeting" of the Commission. At such "daily meetings" two other commissioners affix their signatures to the decision which has been written by the single commissioner.

It would appear, therefore, that three commissioners have dealt with the claim at this particular adjudication, namely the commissioner who wrote the decision, and the two other commissioners who signed the form indicating refusal of pension.

It is presumed that the policy of the Commission to declare as ineligible only those two members who signed the form is based on the fact that the member who wrote the decision could not be considered as a person who "sat as a member of the Commission" in accordance with Section 60(5)(c) or Section 62(5).

The complaint is that the member who wrote the decision should be barred from hearing such case at the appeal level, inasmuch as he had previously studied the case and had written the decision which was ratified by the two other commissioners who signed the refusal form.

It came to the attention of your Committee also, through the evidence of members of the Pension Commission, that at Appeal Board hearings the commissioners had access only to a docket containing the previous findings. The information in this docket is supplemented at the hearing by the summary of evidence prepared by the Veterans' Bureau of the Department of Veterans Affairs.

Representations and Evidence

The evidence placed before your Committee indicated that, in many instances, more information would have been helpful. It appears that the members of an Appeal Board have no knowledge whatsoever of the case until the case is called for hearing.

It is apparent also that in some Appeal Board hearings the presentation of the claim is well on its way before the Appeal Board members are apprised of the issues. The view was put forward that this tended to affirm the applicant's belief in the impartiality of the tribunal; in other words the members of an Appeal Board would thus have no preconceived ideas as to how a case should be decided.

On the other hand, it is apparent that the proceedings must, in many instances, be perfunctory. The average day's work of an Appeal Board consists of five hearings. This gives only a bare minimum of time to digest the facts and it would seem to your Committee that there should be time for pre-consideration if desired.

Other complaints:

Your Committee observed Appeal Boards in session, and read a number of files, in order to determine the manner in which Appeal Board sessions were conducted. In addition, your Committee staff examined the Appeal Board procedures and reported on them in detail.

In general, your Committee would comment as follows:

1- Pension Commission Decisions

The applicant was given little opportunity, before the Appeal Board hearing, to determine the basic questions involved in his appeal. Admittedly, he received counselling from the veterans advocate and any others he had selected to represent him, and was provided with a copy of the summary of evidence.

Representations and Evidence

Your Committee considered, despite these measures, that it is unlikely that he would have much opportunity to review the basis upon which previous adjudications had been made, particularly inasmuch as the decisions written by the Commission were often of a somewhat cryptic nature.

2- Conduct of hearings

Your Committee gained the general impression that Appeal Board members were helpful and displayed an attitude of interest towards an applicant.

3- Availability of information prior to a hearing

Appeal Boards followed the policy of commencing a hearing with no previous knowledge of a case scheduled to be heard. This placed the commissioner in the situation where he must attempt to assimilate all of the facts within a short space of time. It is current practice for an Appeal Board to hear five cases in a morning's sitting, which presumably provides less than 30 minutes for each case. It is also the usual practice to reserve the afternoons of the same day to prepare the decisions, although, in a more involved case, the members may reserve the decision to provide time for an appropriate study of the issue.

4- Transcript of evidence

The policy of the Commission is to use a shorthand reporter who takes down only the medical evidence. The individual commissioners are required to make their own notes. The reporter transcribes the medical evidence only where the decision is adverse. Hence, the only record of an Appeal Board hearing is the individual notes of the commissioner, plus a transcript of medical evidence in cases where the claim fails.

Representations and Evidence

5- Advocates pleading

It was not the practice of the advocate or others representing the applicant to make a written submission. Hence the commissioner had to rely on their own notes regarding the arguments and pleadings on behalf of the applicant.

6- Written decisions

The decisions of an Appeal Board were not written in accordance with any standard procedures or requirements. Hence, these decisions often failed to set out the issues, or to summarize the evidence and explain the reasons for a decision. Presumably such decisions, when communicated to the applicant, must have failed to convey to him a satisfactory image of the grounds upon which the decision was based.

COMMITTEE RECOMMENDATIONS

(15) that the procedure, where an applicant desires to advance his application beyond the renewal stage * should be as follows:

Procedure

(a) The Pension Commission staff, upon receipt of notification from the applicant, should prepare a statement of case setting out a summary of the evidence in regard to previous adjudications, a citation of the pertinent legislation and policy, a summary of the decisions of the Commission, and the reasons therefor.

Statement
of Case

(b) A copy of this statement of case should be forwarded to the applicant and those representing him, except that where the statement contains information which might be harmful to the health or well-being of the applicant a copy be provided to his representative only.

Copy to
Applicant

(c) A pension applicant, upon reviewing the statement of case, should be required to inform the Pension Commission if he desires to proceed with his case before an entitlement board. If he does not respond, the Commission may assume that he does not wish to proceed and the record may be closed. Where the applicant decides to proceed, he should be required, with assistance of the pensions advocate or other representative, to file a "Request for Entitlement Board Decision".

Request for
Entitlement
Board
Decision

(d) Where the applicant files a request for entitlement board consideration, the Pension Commission staff should prepare and forward to the pensions advocate and other representatives of the veteran, a docket consisting of:

Commission
To Prepare
Docket for
Advocate

* See Recommendation No. 27, Volume I, Chapter 9, page 347.

Committee Recommendations

- (i) Statement of case; and
 - (ii) Medical precis.*
- (e) The Chairman of the Pension Commission or his delegate should then make arrangements for either:
- (i) An Entitlement Board hearing before three members of the Commission; or
 - (ii) Where such is not deemed practical for reasons of time, travel or inconvenience, a personal appearance by the applicant and his witnesses before a person or persons specially delegated by the Commission to take evidence, this to be known as "Examiner's Hearing". In this case the decision would be made by an Entitlement Board on the evidence without further hearing. An applicant may refuse an Examiner's Hearing, and insist that his case be heard by an Entitlement Board as set out in e(i) above. In such instance, the Commission should not be held accountable for any delay involved.
- (f) Entitlement Board hearings should be held in Ottawa and at other locations in Canada as may be practicable. At such hearings the applicant and his witnesses shall appear at public expense.
- (g) The following rules of practice should govern these hearings:
- (i) The members of the Entitlement Board should be furnished by Commission staff with a docket two weeks in advance, containing th-

* See Recommendation No. 91, Volume II, Chapter 21, page 834.

Committee Recommendations

statement of the case, the medical precis and any submissions prepared by the Bureau of Pensions Advocates or others representing the applicant.

- (ii) The personnel of Entitlement Boards should be nominated by the Chairman or Deputy Chairman of the Commission, and the existing practice of attempting, where feasible, to have review boards comprised of a medical doctor, a lawyer, and a layman need not be continued, but no two members of the same profession should sit on the same board.

Composition
of Boards

- (iii) The Pension Commission, through the Chairman, should set down from time to time the guide lines under which Entitlement Board and other hearings shall be conducted.

Guide Lines

- (iv) The presiding member and other members of the Entitlement Board should be permitted to question the participants but proceedings of an adversary nature must not be permitted to develop.

No Adversary
Proceedings

- (v) The Entitlement Board hearings should commence with opening remarks by the presiding officer, in which he would explain the purpose of the hearing and cite briefly the main points in the statement of case. The oath would then be administered and the applicant or those representing him be requested to proceed with the submission.

Conduct of
a Hearing

All argument and testimony should be relevant and material to the question at issue. Strict court rules of evidence should not be invoked and considerable latitude should be permitted in the presentation by the applicant or those who represent him.

- (vi) The members of the Board should observe any apparent disability in the applicant pertinent to the pension application, at the applicant's request.

Disability
No View
Requested

- (h) All discussion at an Entitlement Board Hearing should be recorded and, where requested, a transcript prepared for the Entitlement Board members, with additional copies for the applicant and those representing him.

Transcript

- (i) An examiner's hearing would usually be held where long delays may be expected, where it is not practicable for an Entitlement Board to visit the area in which the applicant resides or where for other reasons a hearing before an Entitlement Board is not deemed practicable by the Chairman of the Commission. The record would be submitted to an Entitlement Board for decision.

Examiner's
Hearings

- (j) The rules of practice set out in paragraph () above should apply for examiner's hearings and the claimant could, if he desires, have his case presented by an advocate or others representing him, in the same manner as that which would apply for Entitlement Board hearings. The applicant and his witnesses should appear at public expense.

Rules of
Practice
Apply

Committee Recommendations

- (k) At an examiner's hearing, the Commission representative presiding should be required to study the docket and be empowered to ask such questions as may appear necessary to ensure that the applicant may participate fully in the examination to ensure an opportunity for him to furnish all pertinent information. If necessary the Commission Chairman could provide the examiner with a list of questions which the Commission may wish to have the applicant or witnesses answer. The applicant should be accompanied at the hearing by those he wishes to have represent him.

Duties of
Presiding
Officer

- (l) A record should be made of all discussion at the examination and a transcript prepared which, with supporting documentation, would be forwarded to the Head Office of the Commission where such should be placed before an Entitlement Board for decision.

Records
Reviewed by
Entitlement
Board

- (m) The Entitlement Board, when considering a claim made at a hearing or at an examiner's hearing should reach its decision on the basis of a discussion among the members, with any necessary transcript available. Where necessary, the members should consult the Commission files to determine interpretation and policy.

Board to
Reach
Decision
After Con-
sideration
Of Document

Committee Recommendations

(n) The decision of the Entitlement Board should be in sufficient detail to provide an explanation of the issues, the evidence, the legislation and its interpretation, the evaluation of the claim, the inferences and presumptions, the findings of the fact and conclusions of law. Copies of this decision would be communicated to the applicant and those who represented him.

Board decisions to
Written Detail

(o) Instructions for the preparation of documentation required in the Entitlement Board proceedings should include each of the following where applicable:

Preparation Document

(i) Statement of case: This to be prepared by Commission staff and to include:

Statement Case

Issues: The claim or claims of the applicant to be separately stated.

Issues

Summary of evidence: The evidence pertinent to the issues raised in the application including location and circumstances of service, military, medical record and other evidence from the file to be given. This summary to be in chronological order and to include all occurrences pertinent to the case which are a matter of record.

Evidence

Adjudication actions: An explanation of the previous adjudications by the Commission to be given.

Adjudication

Committee Recommendations

Citation of pertinent legislation: The appropriate sections of the Act, published interpretations, etc., to be included. Legislation

(ii) Transcript of examiner's or Entitlement Board hearing:

Transcript , where requested, should be a complete record. Transcript

(iii) Decisions of Entitlement Board: These should be prepared by the presiding officer or other member of the Board and should include:

Decisions

Issues: A statement of the issue or issues, the names and affiliation of those representing the applicant; the names of witnesses at the hearing; and the names of any persons consulted by the Board, apart from Commission staff, to be given. Issues

Contentions: The contentions of the applicant to be stated in general terms. Contentions

Evidence: A condensation of the evidence, both favourable and unfavourable, which is pertinent to and has a bearing on the contentions advanced; diagnosis and physical and clinical findings to be included, with explanation in non-medical terms where possible, to be stated. Evidence

Inferences and presumptions: The inferences and presumptions drawn by the Entitlement Board to be explained. Inferences and Presumptions

The Law: Legislation and published interpretations to be explained, pointing out the statutory and regulatory provisions governing entitlement to the benefits sought. Law

Committee Recommendations

Evaluation: This to include an explanation or clarification of the reasoning which the Entitlement Board used in arriving at its findings; including the views of the Board regarding any conflict or inconsistencies in the evidence.

Evaluat

Findings of Fact: These to include a synopsis of both the basic facts and those which control the disposition of the case, to be stated in concise terms.

Finding
Fact

Conclusions of Law: These to include the deductions of the Board as to whether the applicant is or is not entitled to the benefits claimed; such conclusions to be distinguished from the findings of fact in that they are arrived at through the application of the legislation; such conclusions must be consistent with or supported by the findings of fact.

Conclus
of Law

Decision: This is to be stated succinctly, to be based on the issues as stated at the outset of the decision.

Decisi

General: A copy of the decision would be made available to the applicant and those who represented him, except where the decision contains statements which might be harmful to the health or well-being of the applicant, in which case the decision will be communicated only to his representatives.

Genera

Committee Recommendations

(16) That the Commission Chairman institute a quality control procedure designed to review and evaluate the quality aspects of the decision processes within the Commission, based on the following:

Quality
Control

(a) A review by the Chairman or persons delegated for such purpose, of selected statements of case, thus providing a means of examining into the quality of statements of case, as prepared by Commission staff.

Review
Statements
of Case

(b) A review of transcripts of examiners' and Entitlement Board Hearings, thus providing a means of examining into the conduct of examinations and hearings including the standards of performance of the presiding officer and members, the handling of evidence and the extension of due process to the applicant.

Review of
Transcripts

(c) A review of selected decisions, thus providing an opportunity to evaluate the decisions.

Review of
Decisions

(17) That Sections 60(5) and 62(5), which provide that no member of an Appeal Board shall adjudicate upon a case if he has previously sat as a member of the Commission and any adjudication of that case, be repealed.

Appeal
Board
Members
Not Barred
if They
Adjudicated
Previously

(18) That the submission prepared by the Veterans' Bureau, or by others representing the applicant, shall be furnished to the Commission following which arrangements will be made for the examination or hearing any time after expiry of two weeks.

Veterans'
Bureau
Submission
Available
Two Weeks
in Advance

Committee Recommendations

- (19) That the docket prepared for an Entitlement Board decision shall be made available to the Veterans' Bureau and, where applicable, to others selected to represent the applicant, at least two weeks in advance of an examination or hearing.

Docket to
Available
Appeal Board
Veterans'
Bureau and
Others
Weeks in
Advance

COMMENT

Statement of Case

Your Committee has recommended that when an applicant notifies the Commission that he desires to advance his appeal beyond the renewal stage, the Pension Commission staff shall prepare a statement of case, a copy of which would be forwarded to the applicant. It is essential that the Commission be provided with sufficient staff to ensure that there is no undue delay in the preparation and despatch of this document to the applicant. As explained in the recommendation, this statement of case would set out, in clear and concise terms, the full story of the pension application, from its inception to date. This "statement of case" procedure is used in both the British and United States pension systems. It is of interest that, in the United States, the statement of case apparently satisfied 279 appellants out of a total of 18,775 disability cases, in that, after receipt of the statement of case, they did not pursue the appeal.⁴

It is the view of your Committee that an applicant might well decide, after reviewing the statement of case, that his claim could not succeed. If he were to drop the case at this stage, he might save himself considerable time and inconvenience which would otherwise be required in pursuing a claim which could not be approved under the legislation. Where an applicant files a request for an Entitlement Board decision the Commission would proceed to arrange consideration by an Entitlement Board.

Docket for Commissioners

The next step would be for the Commission staff to prepare a docket to be used by the Entitlement Board in its consideration of the application. This docket would include the statement of case and the medical precis, the latter to be prepared by the Medical Advisory Branch of the Commission.

CommentHearing or Examination

Your Committee considers that, at this stage, the applicant must be given an opportunity for a personal appearance. If it is practicable to bring him before an Entitlement Board of the Commission, this should be done. On the other hand, it may satisfy the situation if he can make a personal appearance before a person or persons specially delegated by the Commission to hear his presentation. These persons could act for the Entitlement Board, obtaining all the necessary evidence which could be a matter of record, such to be submitted to an Entitlement Board for adjudication.

The suggested institution of these "examiner's hearings" is made partly to facilitate the Entitlement Board decision, and partly to save administrative expense. It is necessary to recognize that the population of Canada is widely spread and it may not be feasible to arrange for sittings of Entitlement Boards in all locations and under all circumstances which may be required in order to deal with entitlement claims.

The system suggested by your Committee could speed up the Entitlement Board proceedings, and would ensure the applicant of a personal appearance. These examinations might also provide a means of taking evidence from expert witnesses who could not, under ordinary circumstances, make arrangements to appear before an Entitlement Board.

These examinations could be conducted by one commissioner, sent on circuit for this purpose. Alternatively, on a restricted basis the Pension Commission could consider making use of local officials of the Commission or the Department of Veterans Affairs or other competent individuals to conduct these.

Comment

Your Committee considers that the Pensions Medical Examiners in the District Offices should not be used for this purpose as they will have acted as the agent of the Commission in submitting the case in the first instance.

Your Committee's recommendation is to the effect that, if an application is handled under the procedure of an examiner's hearing, the record of which is forwarded to an Entitlement Board for a decision, the applicant would not be accorded a hearing before an Entitlement Board.

It should be noted that the decision to use an examiner's hearing is the responsibility of the Commission Chairman. Should an applicant, or those who represent him, object to having the case heard by an Examiner rather than before a full Entitlement Board, the Commission Chairman will arrange an Entitlement Board hearing. However, your Committee considers that, where the Commission Chairman has suggested an Examiner's hearing rather than an Entitlement Board, and an applicant refuses the former, the Commission should not be held accountable for any delay involved in getting the matter before an Entitlement Board.

Rules of Practice

Your Committee has suggested some rules of practice to govern Entitlement Board hearings. It seems advantageous that the docket containing the statement of case, the medical precis, and the advocate's submission should be placed in the hands of the members of the Entitlement Board at least two weeks in advance of a hearing. This could lead to criticism that the members were being given an opportunity to prejudge the case. This criticism, in the view of your Committee, is outweighed by the advantage of permitting the commissioners an opportunity to become fully familiar with the background of the case, and to study the submission being made on behalf of the applicant. The Commission could then use the actual hearing to clarify the

Comment

issues, to obtain such additional information as they may require, and to observe the applicant and his witnesses in person.

The practice, under which the first information permitted to a commissioner sitting on an appeal is that contained in the docket handed to him in the presence of the claimant, is believed designed to create the impression that the commissioner has had no opportunity to come to a decision in advance. It may have been intended also to ensure that the commissioners are not given an opportunity to view in advance the evidence on which the previous decision or decisions were based.

Your Committee recognizes some merit in this practice. At the same time, it seems evident that, in a hearing which must necessarily take place in a short period of time, a commissioner can hardly be expected to assimilate all of the pertinent information at the hearing itself. Hence your Committee concludes that, on the balance, the claimant will benefit from a procedure which permits a commissioner to acquire some knowledge of the case prior to the hearing, and which would place him in a position to take full advantage of the hearing to hear the applicant's claim, and to evaluate the evidence. Your Committee is of the opinion that restrictions should not be placed upon the commissioner regarding prior review of the file or other study of the case.

Under present circumstances, and in some instances, there is the danger that a commissioner will concentrate on acquiring background information, rather than directing his full attention to the matters being presented at an Appeal Board hearing.

Hence, the recommendations that the commissioners be furnished with additional information at the hearing and that commissioners be free to review files prior to a hearing are commended to the Pension Commission.

Comment

Your Committee considers that it is neither practicable nor necessary to retain the principle under which Appeal Boards are now composed, so far as possible, of a medical doctor, a lawyer, and a layman. It is admitted that medical knowledge would be of value in arriving at a decision in many pension claims. However, this knowledge is available to the Commission through its medical advisers, and independent medical opinion may be obtained outside of the Commission where necessary. Also, legal knowledge and training could be useful for a member of the Commission called upon to decide pension claims. Notwithstanding, this is not an essential requirement and legal opinion can be sought by the Commissioners from advisers both within and outside the Commission, where required.

Your Committee considers that, where such can be recruited to the Commission, its composition should include a representative number of medical doctors and lawyers. It is essential, however, that regardless of a commissioner's professional training he must, while acting in the role of a commissioner, apply his training, experience and judgment on a general basis and not permit professional status to govern his decisions.

In proposing the setting-down of guide lines for the conduct of Entitlement Board hearings, your Committee is not suggesting that existing practices of Appeal Board hearings are in any way improper. As represented to your Committee, the standard is high. It is desirable that the Entitlement Boards continue in this tradition.

Your Committee suggests, as in the case of the present Appeal Boards, that the members be permitted to question the participants but no adversary proceedings be allowed to develop. As at present strict court rules of evidence should not be invoked and considerable latitude permitted in the

Comment

presentation by the applicant or those who represent him. A member of an Entitlement Board, sitting at an actual hearing, should use the opportunity to observe any apparent disability in the applicant, bearing in mind the necessity to avoid embarrassment.

Transcript

Your Committee suggests that it is essential, in Entitlement Board hearings, that a transcript of all discussion be obtainable. Therefore, all proceedings should be recorded.

Recording and transcription have posed real difficulties in the past and your Committee does not suggest that it has all the answers in this field. It is apparent however, that there are great developments afoot in this field, and in the future, the difficulties may well disappear. To illustrate your Committee would mention that recording equipment is available with individual microphones, which are placed before the members and witnesses, controlled by a "microphone mixer" operated by a typist who keeps a running record of the names of each speaker. It is necessary, under this system, for the presiding officer to conduct a meeting in such manner to permit only one person to speak at a time and where he considers that the enunciation of a speaker has not been clear, he must necessarily ask that the statements be repeated. This system is in wide use now for small hearings and your Committee believes after reviewing a report from the Committee staff on its operation, that it would be adaptable for examinations or Entitlement Board hearings. The typist who operates the equipment is employed to type the transcript and to certify that it is a correct transcript of the proceedings.

The Commission could install this equipment in the larger district offices and use district office staff to supervise the recording and to transcribe the discussion at the examinations and Entitlement Board

Comment

hearings in the district office, or in other locations within the district office territory. It may not be practical to install the recording equipment or have trained staff in the smaller districts. The Commission should therefore train and have available a pool of operators who can travel from the larger districts or from Ottawa for the purpose of preparing transcripts of examiner hearings and Entitlement Boards hearings as necessary. There may, of course, be other answers to the problem. However, your Committee feels that transcription of the proceedings does not present the problems it did formerly.

Decisions

Your Committee suggests that the decisions of an Entitlement Board be prepared in considerable detail for both approvals and rejections. For an approval, a decision which is well-supported by an explanation of the issues, the evidence, the law and the evaluation by the Board, together with its findings and conclusions, would serve to provide a permanent record of the basis upon which the decision was made. For a refusal, a fully-written decision would provide the applicant and those who represented him with an opportunity to study those matters which the Entitlement Board considered pertinent; and they would thus perhaps find the decision more acceptable because of this.

In any event, in the administration of pensions arising from disability or death in military service, the applicant is entitled to full disclosure of all factors which have affected his case. Accordingly, your Committee considers that the decisions should be prepared and promulgated in detail.

CommentQuality Control

Under traditional practice, the succeeding chairmen of the Canadian Pension Commission have not interfered in the decisions of Appeal Boards of the Commission. This has permitted individual commissioners a freedom of action which, although commendable from the view-point of independence, might well lead to a lack of appreciable standards in regard to Commissioner decisions. Your Committee has recommended elsewhere that the Chairman of the Commission should be given definite responsibility in regard to the guidance of the affairs of the Commission. One of these recommendations concerns the establishment of a quality control procedure which provides for a review of the decision-making processes at all levels of adjudication up to and including the Entitlement Board. The details of the proposed quality control procedure are set out in the recommendations on page 136 hereof. It is perhaps sufficient to state that, in your Committee's opinion, the procedure which provides for consideration of an application by one commissioner or a quorum of Commissioners at the first, second and renewal stages, and by a decision of an Entitlement Board, based either on record of an examiner's hearing or on a full Board hearing, will provide an adequate basis for full consideration. It is of prime importance, however, that some means be established to determine the quality of these decisions. In your Committee's view this is the responsibility of the Commission chairman, to be carried out in accordance with accepted standards of quality control and supervision.

Deletion of Prohibition Against Commissioners Adjudicating Twice on Same Case

Your Committee considers that complaints on behalf of those applicants who were required either to consent to accepting a commissioner who was

Comment

disqualified because of his previous association of the case, or to accept what might prove to be a lengthy delay, are justified.

Your Committee sympathizes with the problem facing the Pension Commission in having to provide hearings in areas so widely distributed geographically as the size of Canada compels.

Deletion of the sections as recommended would serve only to relieve the Pension Commission of this serious problem, and would leave the applicant without a choice in the matter. However, if your Committee's recommendations are accepted the Entitlement Board will not be the tribunal of final resort. This will substantially answer the complaints.

If the number of pension commissioners is to remain at a reasonable figure, and if service is to be given in the various parts of Canada, and if applicants are to have the benefit of several forms of review, some duplication of Commissioners rendering more than one decision on the same case must be accepted.

The evidence indicates that the Commission has made an honest effort to avoid this duplication in the past but has found complete conformity virtually impossible. Your Committee considers that the Commission has strained the meaning of the Act, in concluding that a commissioner who dictated a decision prior to appeal was not disqualified from sitting on an Appeal Board dealing with the case in question. Again, it should be pointed out that your Committee sympathizes with the Commission in its difficult task and the above recommendations would serve to relieve this difficulty.

ENTITLEMENT BOARDSREFERENCES

1. Proceedings of Committee Sessions, Volume III, Page L-156.
2. Ibid, Volume IV, Page R-58.
3. Ibid, Volume VI, Page KK-120.
4. Annual Report 1965, Administrator of Veterans Affairs, (U.S.) Page 309.

CHAPTER 6
LEAVE TO RE-OPEN

GENERAL

The principal section of the Pension Act concerning leave to re-open reads as follows:

- 65(4) An application based upon error in any decision on an appeal from a decision of the Board of Pension Commissioners for Canada or the Commission, by reason of evidence not having been presented or otherwise, may be entertained by the Commission with the leave of an Appeal Board of the Commission designated by the Chairman of the Commission from time to time for the purpose, and any Appeal Board so designated has jurisdiction to grant leave in any case in which it appears proper to grant it.

The procedure in regard to leave to re-open is affected by two other Sections of the Act as follows:

- 60(4) The Commission may, in its discretion, entertain a further application in respect of any injury or disease resulting in disability, prior to a hearing by an Appeal Board of the Commission, but after a hearing by an Appeal Board, the Commission may entertain no further application in respect of any injury or disease whatsoever, subject, however, to the provisions of subsection (4) of Section 65, respecting leave to re-open an application in certain instances.
- 60(5) After a decision has been rendered by the Commission, upon the applicant's written request, the Commission will arrange for a hearing by an Appeal Board of the Commission subject to the following conditions:
- (a) that additional evidence may be submitted;
 - (b) that prior to an Appeal Board hearing, the applicant has submitted to the Commission a statement, signed by himself, setting forth all disabilities that have been previously ruled on adversely by the Commission, and that he claims to be the result of injury or disease or aggravation thereof attributable to or incurred during military service, in regard to which he may desire to claim pension; and
 - (c) that no member of an Appeal Board of the Commission shall adjudicate upon any case

General

coming before an Appeal Board pursuant to this section, if such member has previously sat as a member of the Commission at any hearing of such case, as herein provided, unless the applicant's consent thereto has first been obtained.

The effect of the above two sections is that an applicant proceeding to appeal is required to sign a statement setting forth all disabilities that have been previously ruled on adversely for which he is requesting appeal action, and the Commission may entertain no further application in respect of any injury or disease whatsoever.

Section 65(4) of the Act states that an application for leave to re-open may be considered if it is based upon error in a decision by an Appeal Board, or one of the former appeal bodies, "by reason of evidence not having been presented, or otherwise".

The Pension Commission interprets this as meaning that it can consider new evidence, but only if such is of sufficient importance to nullify, or at least cast serious doubt, on the evidence upon which the previous decision was based.

This policy is set out in a memorandum from the Commission Chairman as follows: '

Conversely, the mere production of evidence is not in itself sufficient to warrant the granting of leave unless it is established to the satisfaction of the Board that such new evidence is of sufficient importance to nullify, or at least cast serious doubts, on the evidence upon which the decision is based.

The Commission expects that, where an application is based on the supposition that the new evidence destroys or challenges previous evidence, this contention must be not only alleged, but supported.

General

The majority of applications for leave to re-open are based on:

- (1) Error in the decision of an appeal or former appeal body ,
- (2) new evidence not previously submitted; or
- (3) new medical conditions not previously ruled on.

Your Committee seriously questions the reasonableness of an applicant, having once gone to appeal, being required to obtain permission from an Appeal Board of the Commission to re-open the case when he desires a decision on the pensionability of an injury or disease not previously considered by the Commission, (i.e., a new medical condition or a new diagnosis) which is interpreted by the Commission as one which is deemed to be consequential upon another condition for which pension entitlement has been granted.

The Act stipulates that, once an applicant has gone to appeal, the Commission may entertain no further application in respect of injury or disease whatsoever. It is difficult to know the intent of the legislators but your Committee considers it necessary to make a recommendation for an amendment of the Act in this regard.

Procedure

The Pension Commission follows the procedure of appointing Appeal Boards on a rotating basis to hear applications for leave to re-open. These Boards sit only in Ottawa and, as a general rule, the applicant is not required to appear. The case is presented either by a Pensions Advocate of the Veterans Bureau, or by a representative of a veterans organization, both of whom make written submissions and attend the Appeal Board hearing in person to make oral pleading.

General

An Appeal Board considering applications for leave to re-open follows the same general rules as in the matter of appeals and the hearings differ only in that neither the applicant nor witnesses are usually present.

An Appeal Board set up under Section 65(4) to hear a claim for leave to re-open does not consider the merits of the claim or the decision of the original Appeal Board, but hears only argument directed to the question as to whether there was an error in the previous decision by reason of evidence not having been presented, or otherwise.

If the Appeal Board, having heard the application, is of the opinion that there was in fact an error as described in Section 65(4) the application succeeds with the result that the Commission is permitted to review the application at an initial hearing. This means, in effect, that the application is treated as a new claim, and is, from then on, subject to the same procedures as other claims; i.e. initial and renewal hearings for World War II, first and second hearings for World War I and Regular Force, and, if necessary, once again through an Appeal Board of the Commission.

HISTORY

Provision for leave to re-open a case after a final decision 1927
 was incorporated into the Pension Act in 1927.² This provision
 reads as follows:

Provided that if within one year after a decision by the Federal Appeal Board upholding a refusal of pension by the Board of Pension Commissioners for Canada or one year after the passing of this proviso, whichever is the later, the applicant submits newly discovered evidence which, in the opinion of a majority of the Board of Pension Commissioners for Canada, establishes a reasonable doubt as to the correctness of the previous decision, the Board of Pension Commissioners for Canada shall reconsider such case, and if refusal of pension be confirmed, the applicant shall have the right of a second appeal to the Federal Appeal Board and its decision thereon shall be final and shall be binding upon the applicant and upon the Board of Pension Commissioners for Canada.

This provided that, where an applicant submitted newly discovered evidence within one year after a decision by the Federal Appeal Board upholding refusal of pension, the Board of Pension Commissioners could reconsider the case.

When the Pension Appeal Court replaced the Federal Appeal Board 1930
 this principle was carried on in the Act under Section 72(3).³ This
 provision then read, in the Act, as follows:

72(3) Any decision of the Pension Appeal Court against an applicant and any such decision by the Pension Tribunal which is not appealed shall be final and no application based upon any error in such decision, by reason of evidence not having been presented or otherwise, shall be entertained by the Commission or the Pension Tribunal except with the leave of the Pension Appeal Court, which shall have jurisdiction to grant such leave in any case in which it appears proper to grant it.

The provision for leave to re-open in the 1930 Act involved considerable change in principle. During the ten years of the Federal Appeal Board, leave to re-open a case before the Board of Pension

History

Commissioners could be granted on the basis of newly-discovered evidence. In the 1930 amendment, the concept was expanded to provide leave to re-open where it was considered there had been an "error" in the original decision "by reason of evidence not having been presented or otherwise". This latter term included the previous stipulation which made it possible for leave to be granted where the applicant discovered new evidence. The addition of the words "or otherwise" presumably expanded the conditions under which leave to re-open could be granted.

The 1930 provision represented another substantial change, in that leave to re-open by the Canadian Pension Commission or the Pension Tribunal was possible only with approval of the Pension Appeal Court. When the Federal Appeal Board operated between 1924 and 1930, the Board of Pension Commissioners (the forerunner of the Canadian Pension Commission) could re-open a case if the applicant had new evidence, without authority of the Federal Appeal Board.

When the Pension Appeal Court was abolished in 1939 the "leave to re-open" provision was amended as follows:⁴ 1939

- 58(4) An application based upon any error in such decision or in any decision of the Court, by reason of evidence not having been presented or otherwise, may be entertained by the Commission with the leave of an Appeal Board of the Commission, such Appeal Board to be designated by the Chairman of the Commission from time to time for this purpose, and such Appeal Board shall have jurisdiction to grant leave in any case in which it appears proper to grant it.

This amendment preserved the principle of the 1930 Act, but transferred the power for leave to re-open from the Pension Appeal Court to an Appeal Board of the Commission. There have been no significant changes in the intent of this provision of the Act since that time.

COMMITTEE RECOMMENDATIONSCanadian Pension Commission

(20) That, in regard to "leave to re-open" applications before the Canadian Pension Commission, where a proposed Entitlement Board, an Appeal Board of the Commission or an appeal body has ruled adversely in regard to an entitlement claim, the Act be amended as follows:

(a) ~~To~~ provide that where an adverse ruling has been given in regard to one or more conditions, and a new condition arises for which the applicant wishes to claim a pension, the Commission may entertain an application without leave to re-open from either the Commission or the Pension Appeal Board.

New
Conditions

(b) The provision in the existing Section 65(4), to the effect that a new application may be entertained by the Commission where an application in regard to an injury or disease has been previously ruled on adversely by an Appeal Board of the Commission or a former appeal body, where such is based on error by reason of evidence not having been presented or otherwise, be replaced by a wording which specifically states that leave to re-open shall be granted where either:

(i) New evidence exists which may have affected the previous decision had it been presented; or

New
Evidence

(ii) There is apparent error in procedure, or in fact, or in law.

Error

Committee Recommendations

(c) Leave to re-open may be granted on the authority of one Commissioner, based on a written submission, with the proviso that, if the Commissioner is in doubt, he may:

- (i) arrange to hear the advocate or other representative;
- (ii) request the Commission Chairman to submit the case for consideration by a quorum of the Commission; or
- (iii) request the Commission Chairman to arrange for a quorum of the Commission to hear an advocate or other representative.

(d) Leave to re-open may be refused only after a hearing by a quorum of the Commission as provided in (c)(iii) above.

(21) That, in regard to applications wherein entitlement has been refused by the Pension Commission prior to the implementation of recommendations in this report, leave to re-open before the Commission be waived in regard to applications based on:

- (i) Presumption
- (ii) Entitlement - Regular Force

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Appl
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COMMITTEE RECOMMENDATIONSPension Appeal Board

(22) That, in regard to "leave to re-open" applications before the Pension Appeal Board, where the Board has ruled adversely in regard to a claim, leave to re-open may be granted only on authority of the Board, such to be decided by one or more members of the Board in its discretion. The following principles are suggested:

Board
May
Grant
Leave to
Re-Open

(a) Leave to re-open before the Pension Appeal Board should apply to both entitlement claims and applications in regard to assessment, degree of aggravation and other discretionary matters under the Pension Act.

To Apply
to All
Benefits

(b) Applications may be based on any sound reason, and in particular the Board may:

Board
to Have
Wide
Discretion

- (i) Consider new evidence;
- (ii) Institute a further investigation;
- (iii) Hold a further hearing; or
- (iv) Review its previous findings.

(c) The Board may dispose of an application for leave to re-open as follows:

- (i) Refuse leave to re-open;
- (ii) Remit the application to the Commission for initial review;
- (iii) Grant the entitlement or other benefit.

Leave to
Re-open
May be
Refused;
Commission
May Review
or Benefit
May be
Granted

COMMENTNew Conditions

There seems no justification for the existing provision in the Act under which it is necessary for an applicant who has previously had a hearing before an Appeal Board, to require special permission for leave to re-open his case when a new medical condition arises.

It may well be that this provision was placed in the Act to bring some finality to pension applications. That is to say, the intent was presumably to bring about the situation where an applicant could not expect to go before an Appeal Board more than once. Hence, the provision in Section 60(5)(b) to the effect that, when proceeding to appeal, he is required to set forth a statement of all disabilities on which he desires to claim pension. This provision, coupled with Section 60(4) which prohibits the Commission from entertaining further applications in respect to any injury or disease after appeal, does bring about an effective finality. The result is that, under the existing procedure, an applicant who develops a new condition must go through the formality of Appeal Board consideration at the head office of the Commission before an application can go before the Commission in connection with this new condition.

Although your Committee appreciates the desire for finality, in order to minimize the number of times an applicant may exhaust his procedural rights under the Act, it is not considered that this procedure should be allowed to continue.

The human body is subject to many physical changes throughout the years, and these changes may be attributable to service conditions. The fact that an applicant has previously exhausted his procedural rights in

COMMENT

regard to one condition, should not be a bar to the Commission entertaining an application in regard to a new medical development.

Moreover, your Committee, in noting the results of a number of cases in this regard, concludes that if the Veterans' Bureau or the veterans organizations can show that new conditions exist, and can show reasonable evidence that this condition could be viewed as being attributable to service, the Appeal Board hearing the application for leave to re-open will grant approval as a matter of form. This seems to indicate that the requirement for an applicant to obtain leave to re-open on a new condition creates an unnecessary hurdle, with attendant delay and additional administrative requirements, neither of which appear to be warranted. Accordingly, your Committee recommends an amendment to the legislation, to provide that a new condition may be the subject of an application before the Commission, regardless of previous adjudication

It may seem that the removal of the stipulation requiring leave to re-open for a new condition would create the situation where applicants would return time after time, requesting consideration of new conditions. There is no evidence to indicate that this would be so. Moreover, even if this did obligate the Commission to deal with new applications for each new condition which might arise, it could hardly be considered that a requirement to deal with these new applications in the form of an initial review would create more work than the existing provision under which an Appeal Board of the Commission, sitting in Ottawa, has to consider a written submission and oral pleading from the Pensions Advocate or representative of a veterans organization. Even if an application in regard to a new condition goes through the procedure of a second or subsequent review by the Commission, and, in the final analysis, is the

COMMENT

subject of a hearing, the procedure would not entail much more detail than the existing provision under which leave to re-open must be obtained in regard to these new conditions.

In further comment on this matter your Committee is not convinced that finality is necessarily a desirable factor in pension applications. The member who has given service in the Armed Forces should, in the view of your Committee, always have the opportunity to apply for pension should he consider that he has a disability which may have been attributable to, related to, or aggravated by his service. The same stipulation should apply to applications from a widow of a member of the Forces.

Definition of New Evidence

The wording in Section 65(4) is to the effect that the application for leave to re-open must be based upon "error....by reason of evidence not having been presented or otherwise". Your Committee is of the opinion that this wording is ambiguous, and should be clarified.

Firstly, it is not considered that this Section of the Act should contain any reference to the word "error". Although it is conceded that a new decision may be possible in view of this new evidence, it is not correct to leave the impression, which may be the case under the present wording, that the previous adjudication was in error by reason of the fact that certain evidence may not have been presented.

Your Committee considers, also, that the use of the words "or otherwise" could be misleading. These words could be taken to mean that an application for leave to re-open could be based on some reason other than "evidence not having been presented". Alternatively they may be taken to mean an application could be based on an entirely different

COMMENT

reason for an error, such having nothing to do with evidence.

The existing wording in Section 64(5) may have been given a broad interpretation by the Pension Commission, presumably on the basis that the subsection is remedial in nature and that, if there is any possibility of an injustice, the case should be reconsidered by the Commission. Notwithstanding, your Committee considers that, in order to avoid uncertainty, the basis upon which an application for leave to re-open can be approved should be spelled out in specific terms.

It is suggested that new evidence, as it relates to leave to re-open, need only be of the nature which refutes evidence upon which the previous decision was based or could in some other way alter the previous decision.

Leave to Re-Open where Error Claimed

Although the Act does not so state, the practice of the Commission in regard to leave to re-open has been to limit the authority of an Appeal Board to a decision on the question of whether there has been an error in a previous decision, by reason of the appellate body not having had all the information available before it. The Commission's practice in this respect is not criticized.

Your Committee noted, however, that some ambiguity exists in this area, presumably arising from the lack of specific direction in the Act as to whether an Appeal Board was empowered to review the merits of the case, as opposed to deciding only on whether the new evidence was such as to warrant reconsideration.

Under the existing legislation, an application for leave to re-open may be based on error "by reason of evidence not having been presented or otherwise". Your Committee considers that where an applicant or

COMMENT

those representing him are able to show sufficient grounds to indicate that the wrong decision has been made, despite the fact that there is no new evidence available, leave to re-open the case before the Commission should be a possibility. Accordingly, your Committee has recommended provision in the Act to this effect.

Procedure

Your Committee considers that the system now used, under which a formal Appeal Board hearing is required to decide upon leave to re-open, is ponderous. The requirement is merely to rule on whether or not there is new evidence of a nature to warrant reconsideration. It would seem that this decision would not usually require a full Appeal Board sitting with its attendant delays, and the utilization of the time of the Commissioners, the advocates or other veteran's representative.

Your Committee envisages four steps which could represent the process for deciding upon leave to re-open, as explained hereunder:

(1) Decision by One Commissioner

In many instances one Commissioner could presumably decide upon an application for leave to re-open, on the basis of a review of a written submission.

(2) Hearing by One Commissioner

Where one Commissioner, on such review, considered additional information to be necessary, he could arrange to hear the advocate or other representative.

(3) Decision by a Quorum

One Commissioner, after reviewing a written submission and, in some cases, hearing an oral presentation, may request the Commission Chairman to submit the case for consideration by a quorum of the Commission. This would presumably take place where the one Commissioner was in doubt.

CONTENT(4) Hearing by a Quorum

This would take place where it was considered by the one Commissioner that the situation warranted a full dress hearing before a quorum, with an oral presentation on behalf of the applicant. The request for a hearing, as suggested herein, would go through the Chairman of the Commission.

The proposal that a request to submit a case for decision by a quorum, or a hearing by a quorum, be submitted to the Commission Chairman, is made in the interest of preserving the existing system, under which leave to re-open applications are heard by an Appeal Board designated by the Chairman.

Proposed Entitlement Boards and Pension Appeal Board

Your Committee considers that leave to re-open should be required in regard to previous rulings of the proposed entitlement boards, should an applicant desire that his case be reviewed by the Commission. Alternatively, should he wish to place his case before the proposed Pension Appeal Board, he should be free to select this course of action.

Commissioner May Adjudicate at Leave to Re-open if Previously Involved

Your Committee notes the interpretation of the Commission, to the effect that the stipulation that no member of an Appeal Board shall adjudicate upon a case upon which he previously sat as a member at any hearing without the applicants consent, does not apply to Commissioners sitting at Appeal Board on leave to re-open applications.

This interpretation would seem to be in accordance with the requirements of the Act, in that the stipulation appears to refer only to Appeal Boards which are dealing with entitlement appeals. The Act contains no reference to the fact that this stipulation should apply to Appeal Boards designated to consider leave to re-open.

CONTENT

Moreover, it seems obvious that where the purpose of an Appeal Board is to decide whether or not new evidence is such as to warrant reconsideration, no valid objection could be raised to a procedure under which the decision in this regard is made, at least in part, by a Commissioner who previously adjudicated on the application at any preceding stage.

Your Committee considers that this same situation should obtain for the leave to re-open procedure as it would operate under the new procedures being recommended in this report. There is no objection if a Commissioner charged with the responsibility of making this decision has had previous experience with the case. In fact, he may be in an advantageous position in deciding whether or not the new evidence is pertinent.

Work Load of Commissioners

Your Committee is conscious of the fact that its recommendations concerning expansion of the provisions for personal appearances under Section 7(3) of the Act would increase the work load of the Commissioners. This increase could be compensated for, at least in part, by a corresponding decrease in the requirement for Appeal Boards to deal with applications for leave to re-open. Your Committee visualizes that it should be necessary, in only a small percentage of these applications, to resort to a hearing by a quorum of the Commission.

Waiver on Leave to Re-open

Your Committee considers that it would be necessary to waive the leave to re-open procedure in regard to applicants who have exhausted their procedural rights under existing legislation, and who wish to apply for a reconsideration in the light of recommendations being made in this report.

COMMENT

It would seem pointless to require adherence to the "leave to re-open" provisions where, because of amendments in this report, an applicant is entitled to a review of his case. In such instances the applicant should be able to proceed directly to an initial review, regardless of whether his case was previously refused by an Appeal Board of the Commission.

Pension Appeal Board Decisions

An appeal should lie to the Pension Appeal Board * only if the applicant has exhausted his procedural rights within the Commission, up to the level of entitlement Board or a hearing under Section 7(3) of the Act. On entitlement claims the procedure would be for the applicant to request leave to re-open his case before the Commission or, alternatively, he may proceed to appeal before the Pension Appeal Board. The appeal procedure in regard to other matters under the Pension Act is provided by way of personal appearance under Section 7(3). There is no "leave to re-open" procedure in regard to such matters once a decision has been made following a hearing under this provision. Accordingly, an applicant would request leave of the Pension Appeal Board to review his case.

When the Pension Appeal Board has decided a case and the appellant requests reconsideration, the Board may remit the case for consideration of the Commission, deny the claim or approve it. Your Committee envisages that the proposed Pension Appeal Board should have wide discretion in all matters in respect to leave to re-open. Applications should be handled by one or more Board members acting on behalf of the Board, or by the

* See Recommendation No. 14(B), Chapter 4, page 78 hereof.

COMMENT

entire Board, depending on the circumstances and upon the policy which the Board may prescribe. An application may be made for leave to re-open on any sound basis, and your Committee considers that there is no requirement to limit this to production of new evidence, as is now the case with the leave to re-open procedure for the Pension Commission.

The Board, or one or more members acting in its behalf, should not be bound by specific principles as to what may be considered on a leave to re-open application. The previous findings may be reviewed, new evidence may be considered, further investigation may be instituted, or, if considered necessary, a further hearing may be held.

In regard to disposition of an application for leave to re-open, your Committee considers here again that wide discretion should be allowed. The Board may refuse the application for leave to re-open, it may remit the application to the Commission for an initial review, or it may grant the application. The chief requirement in regard to the leave to re-open procedure for the Pension Appeal Board is to remove all unnecessary restriction, so that it may take any reasonable action which circumstances appear to warrant.

REFERENCES

1. Memorandum, dated October 15th, 1942, from Chairman, Canadian Pension Commission to Acting Chief Pensions Advocate, Canadian Pension Commission subject file on "Leave to Re-Open"
2. SC 1927, C.65, s.2 assented to April 14th, 1927.
3. SC 1930, C.35, s.14 assented to May 20th, 1930.
4. SC 1939, C.32, s.20 assented to May 19th, 1939.

PRE-ENLISTMENT DISABILITIES:GENERAL

The effect of a pre-enlistment medical condition on an applicant's right to pension is contained in the following references in the Pension Act.

13(1) In respect of military service rendered during World War I or during World War II and subject to the exception contained in subsection (2).

(a) Pensions shall be awarded in accordance with the rates set out in Schedule A to or in respect of members of the forces when the injury or disease or aggravation thereof resulting in the disability in respect of which the application for pension is made was attributable to or was incurred during such military service;

(c) No deduction shall be made from the degree of actual disability of any member of the forces, who has served in a theatre of actual war during World War I or during World War II, on account of any disability or disabling condition that existed in him prior to his period of service in either of the aforesaid wars; but service by a member of the forces in a theatre of actual war may only be counted for the purposes of this paragraph when it has been rendered in the particular war with reference to service in which pension has been awarded; and no pension shall be paid for a disability or disabling condition that, at the time he became a member of the forces, was obvious or was recorded on medical examination prior to enlistment;

2 (q) "obvious means that which would be apparent, clear, plain, evident or manifest to the eye, ear or mind of an unskilled observer on examination.

2 (u) "recorded on medical examination prior to enlistment" includes recorded symptoms or findings in,

- (i) medical proceedings for enlistment,
- (ii) official documentation covering any former period of service,
- (iii) the files of the department,
- (iv) compensation Board or Insurance Company records, and
- (v) the records of a hospital private physician or other medical authority,

where such record refers to the injury or disease resulting in the disability in respect of which the application for pension is made;

General

Where the Pension Commission rules that a medical condition existed prior to enlistment, but where an aggravation of such condition was attributable to or was incurred during military service, it may award a pension under Section 13(1)(a) of the Act. The practice of the Commission is to assess the total disability and to pension the applicant for that part which is considered to have been aggravated in respect to service.

Section 13(1)(c) makes special provision for members who have served in a theatre of actual war, in that no deduction shall be made from the degree of actual disability on account of any portion of the disability which is ruled to have existed in the member prior to his service, provided that this pre-enlistment condition was not obvious, or was not recorded on a medical examination prior to or in the course of enlistment.

Taken together, these sub-sections of the Pension Act mean that an applicant must prove to the satisfaction of the Commission either that there was no pre-enlistment condition existing in him prior to service or if such condition did exist, there was aggravation of the condition which was attributable to or incurred during military service in an assessable degree. If he did not serve in a theatre of actual war he can be pensioned only for the aggravated portion of the disability. If he served in a theatre of actual war, no deduction can be made, but in order to qualify under this provision, the condition must not have been "obvious" or "recorded on medical examination prior to enlistment", in the meaning of the Act.

The Pension Commission's interpretation of an obvious condition, as approved at a general meeting of the Commission on November 1st, 1948, is

General

a condition which is "obvious at the time he becomes a member of the Forces, i.e. enlistment, and not at some previous time".¹

The Commission further defined "record" (pertaining to recorded prior to enlistment) at its general meeting of December 23, 1952² to the effect that evidence must be produced as to the existence of such record. In this interpretation of the Commission, "record" means reduction to writing of medical symptoms or findings, by any of the authorities mentioned in Section 2(u) of the Act. The Commission requires that the record must be produced, or where such record is not available by reason of having been lost or destroyed, the Commission requires satisfactory evidence that there was in fact such written record.

Another interpretation concerning pre-enlistment disabilities requires that entitlement must first be determined under Section 13(1)(a). In an interpretation laid down at the general meeting on February 28, 1950, the Pension Commission agreed that:

It is only after it has been determined that a pension may be paid for a condition aggravated during service under Section 13(1)(a) that provisions of Section 13(1)(c) can be considered.

This interpretation has an important bearing on an enlistment claim for an applicant who served in a theatre of actual war, and who has a medical condition of pre-enlistment origin which has been aggravated by service. If this entitlement could be considered on the strength of Section 13(1)(c) presumably the only tests to be applied by the Commission would be whether the suspected pre-enlistment disability was obvious, or was recorded on medical examination prior to enlistment. If these

General

tests were negative, the claim would succeed.

However, the necessity to qualify in the first instance under Section 13(1)(a) means that, even though the applicant may have been enlisted as medically fit, and even though a disability may not have been obvious or recorded, the Pension Commission could still adjudge that the condition was of pre-enlistment origin.

A clarification of Commission policy in respect to information given by a member of the forces in regard to his medical condition on enlistment was reported by Mr. L.A. Mutch, Deputy Chairman of the Pension Commission, before the 1959 Parliamentary Committee. He stated: ³

There was a time when, if a man admitted on pension examination that he had suffered from some pre-service condition, resort could be taken to that admission, to show that the origin was pre-enlistment.

As the Act is interpreted by my colleagues today, we do not accept a condition as being recorded pre-enlistment unless there is a medical record by a recognized doctor, or the doctor appears before the Commission and swears that at the time he did so record it, but as a result of fire or some other catastrophe the records no longer exist. Then his evidence is admissible under oath. But in practice, the applicant cannot admit something to destroy his own case.

It is assumed by your Committee that, in this statement, Mr. Mutch was referring to the requirement that the Commission must have evidence as to the existence of a written record of medical symptoms or findings before it can rule that a condition was pre-enlistment in origin, even though the applicant for pension had admitted to having the condition prior to enlistment.

REPRESENTATIONS CONCERNING PRE-ENLISTMENT DISABILITIES

Your Committee received a heavy volume of complaints in regard to the provisions of the Act which deal with pre-enlistment disabilities.

The complaints can be summarized as follows:

- (1) The Pension Commission follows the policy of ruling that medical conditions which are generally considered to be congenital or associated with the ageing process are of pre-enlistment origin, even though such conditions:
 - (a) were not obvious on enlistment;
 - (b) were not recorded on medical examination prior to enlistment; and/or
 - (c) were not noted on the enlistment document of the applicant.
- (2) The Pension Commission applied an overly strict interpretation of the meaning of the words "was obvious" in relation to a condition which may have existed prior to enlistment; and
- (3) The Commission applied an overly strict interpretation in regard to what constituted a "record" with respect to medical examinations prior to enlistment.

The representations concerning pre-enlistment disabilities were, in most instances, based on the "fit for service, fit for pension" concept which is assumed to mean that if a man was physically able to render service to his country, he is entitled to the presumption that his condition at enlistment was satisfactory, and that any condition which developed during service (or after service if it could be established that it was due to service) should be pensionable in the full extent of that disability.

REPRESENTATIONS AND EVIDENCEWar Pensioners of Canada (Toronto Branch)

This organization presented the following recommendation: ⁴

Resolved that the condition of the veteran as shown on enlistment, by his medical and attestation papers, be accepted by all parties concerned as a bona-fide base for comparison of subsequent disabilities; and too much reliance should not be placed on the term 'pre-enlistment' condition.

Subsequent discussion revolved around the question of medical examinations on enlistment. Mr. H. Andrews, speaking for the Association, stated:

About the thoroughness of the examination, we feel that if it is not discovered on enlistment, it should not be declared pre-enlistment.

Toronto and District Ex-Servicemens' Advisory Committee

This Committee stated as follows: ⁵

- (a) In many cases it has been brought to mind that a so-called pre-enlistment injury with percentage aggravation is granted even though the veteran enlisted as a soldier in A-1 condition.

Comment: It would appear that the Pension Commission uses documentary evidence of even a childhood injury to claim this aggravation clause, whereas in many instances the veteran has served on active service, even in the field of battle, which would not be possible were he to have the disability which the Commission claims was originally his.

- (b) It has been shown that after leaving the service a man may suffer from a disability which could deprive him of earning a living or even cause his death, and yet the Commission continued to state that he only is entitled to partial aggravation.

In speaking to this observation Mr. Leslie Varley, Chairman of the delegation, stated:

How can the Pension Commission define pre-enlistment

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origin, when it is not on his record? How can they know when a man goes in A-1, how can they know if the man had been examined several times before he had the injury, through regular medical checkups, this that and the other thing, and yet he comes home with a disability; he appears before the Board and they give the cold statement of pre-enlistment origin, not aggravated by service; and yet we know without the service he would not have this disability.

Army, Navy and Air Force Veterans in Canada

The recommendation of this organization was as follows: 6

Conditions Not Recorded on Enlistment: That section 13(1)(a) of the Canadian Pension Act be amended in order that, where an applicant for a war disability compensation, who served in the actual theatre of war, is found to have a disability resulting from an injury or disease not recorded on medical examination prior to enlistment, such injury or disease shall be presumed to have occurred or had its inception during military service.

Comment: Medical examinations for enlistment have been recognized as complete and rigorous. The findings were recorded, and on the basis of such findings the authorities determined whether the recruit was to be accepted for military service and whether he was to be subjected to conditions and the character and place of the recruit's subsequent service, the Government of Canada should consider for war disability compensation purposes its recorded findings on such medical examination. Many war disabled veterans have undoubtedly been denied war disability compensation, which they should have received, had the Government of Canada abided by the results of medical examination on enlistment.

In speaking of medical examinations on enlistment, Mr. J.C.

Lundberg, President of the Army, Navy and Air Force Veterans, stated:

We in the veterans movement must concede the veteran did receive a full and complete medical examination upon his entrance into the service and equally the same full and complete medical examination on his discharge. It is our contention both the findings of these medical particulars should be accepted as fact.

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The representatives from the Army, Navy and Air Force veterans discussed the application of Section 70 (Benefit of the Doubt) in respect to the presumption that if a man were accepted as medically fit on enlistment, pension authorities should not be able to recognize the possible existence of a pre-enlistment condition, and suggested that the legislation should be interpreted to give a "compelling presumption" in favour of the applicant in such circumstances.

Royal Canadian Legion

This organization filed with your Committee a recommendation that Section 13 (1)(a) be amended as follows: ⁷

That Section 13(1)(a) of the Pension Act be amended so that, where a pension applicant who served in an actual theatre of war is found to have a disability resulting from an injury or a disease not recorded on medical examination prior to enlistment, such injury or disease shall be presumed to have occurred or had its inception subsequent to enlistment.

In supporting this recommendation, Mr. Donald M. Thompson,

Dominion Secretary of the Legion, stated as follows:

We believe the Pension Commission should be bound by the findings at the time of medical examination on enlistment, and should be required to work forward from that point in time, unless there is a record of a pre-enlistment disability.

The Commission readily refers to negative findings on discharge, yet in many instances refuses to be bound by negative medical findings on enlistment. Further, the Commission classifies as a pre-enlistment condition any disability, symptoms of which may have existed before service, whether there was an actual diagnosis or not, but declines to accept similar symptoms during service as evidence of a service-incurred disability. We know of claims wherein the Pension Commission has ruled a condition to be of

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pre-enlistment nature, and then drawn a totally unwarranted conclusion that there was no aggravation during service where there is a disability recorded on discharge and none on enlistment. Many war disabled veterans, notwithstanding the ameliorating provisions of Section 13(1)(c), undoubtedly are denied pensions which they would receive if the Commission had to abide by the results of medical examination on enlistment or pre-enlistment medical records. This situation is particularly acute in what are termed constitutional conditions such as mental or nervous conditions.

Mr. Thompson stated further. ⁸

The Commission continues to rule that disabilities were pre-enlistment, not aggravated during service, despite the fact that servicemen have been discharged with symptoms and/or diagnoses while having been enlisted in Category "A".....

Although we have suggested on other occasions an amendment to the legislation, this is not necessary as the proper application of Section 70 would resolve all problems arising under this section of the legislation. If, however, the Pension Commission's attitude persists, then the only alternative is to amend the legislation to ensure that all applicants will receive the fair, large and liberal construction and interpretation of the Act as provided by Section 15 of the Interpretation Act.

With reference to the fact that the recruit had no control over the examination, the following discussion took place before your Committee:

Mr. Thompson: ...We believe they had complete and absolute control of the nature of the examinations, and that the State, through the Commission, should be bound by the findings at the time of the medical examination on enlistment.

Mr. Justice Woods: And do you think it should make any difference -- evidence to the effect that this man had a cursory examination or he had a good examination does not enter into it?

Mr. Thompson: I don't see where it does because, again, the State is in control. If the State were happy to have

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a cursory examination, this was the State's responsibility, and the man had no control. Once he made himself available he did what he was told, and it is the State's responsibility for the examination, not the man's.

Your Committee quotes a further exchange as follows: ¹⁰

Mr. Justice Woods: I gather from what you say at the end of your presentation it probably would be just as well if 13(1)(c) were amended?

Mr. Thompson: Well we have, sir, asked before this as was indicated in our correspondence with Mr. Lapointe that was read into the record this morning, and we had hoped that it could be remedied. It has not been, and it may be that a legislative change is necessary.

Later in its brief the Legion made reference to the interpretation of the Commission with respect to the word "obvious" as it relates to conditions which were obvious on enlistment. The brief stated: ¹¹

We object to the persistence of the Commission in ruling out full entitlement when in fact medical examiners have placed servicemen in Category "A" on enlistment or have made no reference to the said disability. If a disability is not noted on careful examination by a skilled medical practitioner it is not justifiable for the Pension Commission twenty or thirty years later to conclude that such disability would have been apparent to the eye of an unskilled observer. True, when a man manages to enlist with only one arm it may be accepted that the medical examiner for reasons best known only to himself, has neglected to make a notation of this. Our concern, however, is with respect to conditions such as pes cavus, pes planus, varicose veins, hernia and hearing conditions.

In regard to a remedy for the situation, Mr. Thompson stated: ¹²

We are suggesting that the Commission are interpreting it incorrectly in that a condition such as varicose veins, high arches, and these other conditions we

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mentioned -- they say this was obvious on enlistment and they will grant it for the aggravation they admit, but they will deny full entitlement, and we contend many of these things -- we say it is assuming a lot to say that 20 years ago or 40 years ago that that condition was obvious to the eye, ear or mind of the unskilled observer because the doctor saw him and did not make a note of it.

Concerning the words "recorded on enlistment" the Legion brief cited a change in policy on the part of the Pension Commission in 1948¹³ which required that a "record" meant a reduction to writing of medical symptoms or findings and that such policy had obtained for cases since 1948. The Legion stated that rulings prior to 1948 were "in error and we suggest that the decisions should be reviewed and full entitlement granted effective from the date of the original award".

The Legion also commented in regard to Commission policy as follows:

We find fault also with the Commission's policy of interpreting an affirmative reply, by itself, of a serviceman on enlistment as a 'record'. If a man on enlistment answered that he had suffered from varicose veins we expect the medical examiner carried out more than a routine inspection of the legs, and if he failed to make any entry regarding the disability we cannot agree that the Pension Commission should subsequently rule that the sole entry 'yes' constitutes a record within the legislation. We would like to observe that a man, not being skilled in medical diagnoses, might - in his ignorance - assume that he had symptoms of many different conditions, even although he had never received medical attention. For instance, a man who has had a cold may state he has suffered from bronchitis. We know of cases where a man has answered 'yes' to the enquiry with respect to rheumatism. Subsequently if entitlement is conceded for arthritis in any part of his back, this entry is interpreted as a 'record'. In contrast, we have in our records claims of veterans for back conditions who during service had complaints diagnosed as fibrositis or myositis and the Commission has ruled that such a single entry during service does not constitute sufficient medical evidence of the presence of arthritis, and entitlement has been refused.

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The comment by the Legion implies that the Commission follows the policy of interpreting a reply by a member on enlistment, to the effect that he had a medical condition, as a "record" for the purposes of the Pension Act. The Commission's policy as stated by Mr. L.A. Mutch (See sheet 4) appears to indicate that the interpretation by the Commission is that it will not accept the condition as being recorded pre-enlistment unless that record can be produced or, if not available, the Commission has secondary evidence concerning the existence of the record.

Mr. Jack McIntosh, M.P.: Mr. McIntosh suggested that a pension application should not necessarily be ruled out because of some pre-enlistment condition. He referred to skimpy records of childhood diseases and injuries. He commented further as follows: ¹⁴

Well, I would say that this may come up quite often if a man was hospitalized while he was in the services. Quite often the medical officers say: 'Did you have a condition similar to this prior to enlistment?' And the chap will say: 'Yes, when I was a young person I would have croup quite often',

But I fail to see the relation between that and, say, a man being gassed and having respiratory problems. It might mean that he is a little weaker in the chest than normal people, but I do not think his case should be thrown out because he has mentioned that he had some pre-enlistment problems in that regard.

Mr. C.W. Carter, M.P.: * Mr. Carter stated his views on Section 13(1)(a) and (c) in a prepared brief as follows: ¹⁵

As a general principle a veteran whose physical examination showed him to be A-1 on enlistment should automatically receive full entitlement for any disabilities he has on discharge.

* Now Senator C.W. Carter.

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Canadian Pension Commission: Mr. T.M. Anderson, Chairman of the Canadian Pension Commission, in a prepared submission to the Committee, commented as follows regarding Section 13(1)(c):¹⁶

The question then boils down to a simple difference of interpretation by the Commission and the Legion officers. The briefs suggest that if the examining medical officer does not make mention of the disability during the medical examination prior to enlistment, then the condition could not have been obvious. The suggestion goes even further by stating that if the medical examiner says the disability is apparently not very important then the disability cannot be considered as pre-enlistment.

The facts, however, show a different picture. During the war emergency recruiting officers were given certain quotas to meet. Recruiting and examining officers were well aware of the fact that few, if any, volunteers were perfect physical specimens. If they chose to reject every volunteer because of some minor disability, they would have enlisted very few men indeed. There was a war on. Men were needed and if minor disabilities such as varicose veins, or haemorrhoids, bronchitis, etc., were going to interfere with the winning of the war, then they must be disregarded, and disregarded in many cases they were. There was always something a man with psoriasis, or varicose veins, or haemorrhoids, could do to help the war effort, and many of the men who had these disabilities did an excellent job. This did not necessarily mean, however, that their disabilities were not pre-enlistment. In most cases such disabilities were recorded at the pre-enlistment medical examination. In other cases they were in fact obvious to the eye of an untrained observer but were not recorded even though the volunteer himself admitted having the disability. One does not have to be a doctor to recognize varicose veins, psoriasis, or deafness. Also, if the man admits that he has had any of these conditions for many years prior to enlistment, surely one cannot argue logically that the condition is not pre-enlistment. After all the Commissioners are expected in their daily work to use common sense and the real question here surely is, did the man or did he not have this condition before he enlisted?

Mr. H.W. Herridge, M.P.: Mr. Herridge commented to the effect that the examination on enlistment was not thorough, and made reference to

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his own enlistment in World War I. ¹² Mr. Herridge stated that he subscribed to the view "fit for service, fit for pension".

Mr. Herridge stated that a veteran should be given "every consideration"; also, in so far as the Commission is concerned "there has got to be a latitude for them too, shall I say, judging a case on its intangible merits .

Mr. Jack Davis, M.P.: Mr. Davis, in his submission to the Committee under date of March 22nd, 1966, made reference to the United Kingdom legislation as follows. ¹³

As I understand it, the British Pensions Act provides that, if a man was fit when he went in to the service and disabled when he came out there should be a presumption, and a compelling presumption, that the disability which he had suffered was due to war service. The burden of proof was therefore on the Ministry, if it could, to prove that the contrary was the case.

Mr. David Groos, M.P. : Mr. Groos spoke of the difficulty of maintaining medical records in World War II, with particular reference to naval personnel. The following discussion took place: ¹⁴

Mr. Justice Woods: Just apropos of that, Mr. Groos, it has been brought out by others appearing before us that they feel that where a man's records indicate that he was healthy when he went in - that is, if he is A1 on going in, that this should raise at least a very strong presumption if that was his actual condition, and if anything arises subsequent to that, it should presumably have arisen after he was examined.

Mr. Groos: I support that right down the line. This seems to be only just, if they accepted him as being A1.

Mr. Justice Woods: I think the term is used 'fit for service, fit for pension'.

Mr. Groos: Yes, I would certainly support that.

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Mr. Justice Woods: Now, from your own experience, and observations, which we appreciate is confined pretty well to the Navy, did you find that medical examinations were always thorough, that they were uniform or that some examinations were perfunctory and others were thorough, or what was your

Mr. Groos: Well, I wouldn't be in a position to comment on the thoroughness of the examinations. I can give you some examples in the matter of keeping records.

In my own case, I was fortunate in being in a ship which carried a medical officer. I am speaking now about war service which is the only kind of interest to us, but because we were constantly on the move and because in the ship in which I served, which was a comparatively large one, being a destroyer, we didn't have the equipment necessary to give full medical examinations, or because the doctor was overworked in many cases, we were sent ashore to have these examinations. When you went ashore or when you went out of the ship, maybe I had better put it that way, your examination would be carried out in a large ship which did have facilities, or it could be carried out - I am speaking of my own theatre of war - carried out in Halifax, Newfoundland, Iceland, Greenock, Londonderry, any number of places, and getting these records back from these points to the ship, and having them made a matter of permanent record, just wasn't done. In many cases, the papers didn't arrive back on board, or were never put with the personal documents of the person concerned.

I was better off than most, because I happened to stay on the ship for five years, but when you compound the problems of having the rapid turnover of personnel --

Mr. Justice Woods: A large number of drafts --

Mr. Groos: -- might come on and leave in some undetermined port within the matter of two or three weeks, the problem becomes pretty great. I am sure that medical documents were not given a very high priority during the war for getting them back and married up to the man's documents.

If I can say in my own case, in 1954, I think it was, I am speaking personally now but it may prove the point I am trying to make out, in one of my x-rays they found

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a spot on my lung, and when they tried to check back and find out how long it had been there, they couldn't find any record, even in peace time. They looked back through my records, right the way until the time I joined the Navy, and there were only one or two x-rays that had been taken years and years before, and yet I had one every year. Where did they go? You see, when it is difficult to find x-rays and medical documents for a person who stayed in one ship for five consecutive years, it must have been considerably more difficult to put records together for people that came and went every two or three weeks.

To give you some idea of the speed people used to come and go, which I know are familiar to you, sir, but might not be familiar to other people, that in the ship in which I served - I was an Executive Officer, so that is the reason why I have these figures - the ship in which I served during the war, we had a total complement of about one hundred and ninety-eight, or so, men - something less than two hundred. We came back from overseas in 1940, and in the spring of 1941, we recommissioned. We put on a whole new crew, virtually. We came back into Halifax, and stayed there for about another three weeks, and finally sailed off to the war. In that six week period, we had two hundred and nine changes, so in other words the whole new crew which had already been new had been replaced again in that six weeks, and the men had been dispersed.

The point I am getting at is it was very difficult to keep track of a person's medical record.

Mr. Justice Woods: Yes. Some areas of the paper war were just impossible.

Mr. Groos: That is correct.

Non-Pensioned Veterans Widows' Association: Representatives of this group referred to improper medical examination of personnel upon discharge after service during World War I. Mrs. Margaret Wainford, Association President, stated that, because many were anxious to take their discharge, they did not insist on a thorough medical examination on discharge.²⁰

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Mr. Reno Emard, M.P.: Mr. Emard stated before the Committee, as follows: ²¹

Pre-enlistment Disabilities: I am aware that this is one of the long-standing criticisms of our pension legislation. I would venture to say that most Members of Parliament have had first hand experience with cases where a veteran was enrolled in the Armed Forces as category "A", but the Commission has turned him down for pension on the basis that a medical condition existed in him prior to his enlistment. A typical case would be where a veteran develops a hernia. He applies for pension, on the ground that he injured himself while on active service. The Pension Commission will point to a medical entry, made some time during his service, in which he admitted that he had hurt himself in a hockey game when he was fourteen years of age. The Commission will say: 'You hurt yourself when you were fourteen. This is the cause of your hernia and hence the condition is not pensionable because it originated before your enlistment.'

The Commission, in saying this, completely ignores the fact that, even though he may have injured himself when he was fourteen, there was no evidence of the injury when he enlisted in the Armed Forces. I sincerely believe that if the man was category A1 on enlistment the Pension Commission has no right to think that any disability which is apparent now, was, in fact, of pre-enlistment origin. This is a very simple statement of fact, and I cannot see any logical argument against it.

Mr. Harold Winch, M.P.: Mr. Winch stated as follows:

I would therefore, Mr. Chairman, like to start on a matter which not only has been brought to my attention very pointedly over this past 13 years, but in my taking up cases with the responsible authorities, I find a matter which I think is basically wrong. I refer to either the rejection of a pension claim or an aggravation of a condition to limit a pension claim on the basis of the fact that the applicant had a pre-enlistment condition.

I would like to state my own very confirmed and convinced opinion that the pension authorities --

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that is, the federal pension authorities -- should under no circumstances reject or place a limitation because of a pre-enlistment condition. I admit that perhaps upon occasions it could be proven that such was the situation, but it is my contention, sir, that this should not be considered on a pension application.

I base that statement on the fact that I fully realize that in time of war the medical examination is not a thorough examination. As a matter of fact it is a mighty skimpy examination. But if our country of Canada in time of war is prepared to pass an applicant to serve our country overseas or anywhere in a theatre of war and declare he is A1, then I say that in the years that follow, when they accept him when he offers his life and limb, that is not a reasonable basis for decision.

Mr. Winch stated further:

I am not going to spend any more time, Mr. Chairman, on that, but I say, if in time of war Canada will accept a man or woman as A1 and send him to a Theatre of War, where they go, where they serve, now, whether it is from the First World War or the Second World War, ethically and morally we should not say 'pre-enlistment condition'. I just cannot see the morality or the ethics of doing that.

When they were needed, they were A1. There was no pre-enlistment condition - to a great extent because of the skimpiness of the medical examination, but they were accepted and they served.

Veterans' Bureau: Brigadier P.E. Reynolds, Chief Pensions Advocate, Department of Veterans Affairs, expressed the opinion that there might be a tendency on the part of the Pension Commission to accept evidence that a record of a pre-enlistment disability existed despite the fact that the Act did not require a "strictness of proof" that a record did exist.

He stated that the Veterans' Bureau had "some reservation with

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respect to the dangers involved in applying the secondary evidence rule to lost records particularly in the light of Section 70 (Benefit of the Doubt)". He suggested that the Commissioners should require "strict proof of the previous existence of a record and of its loss or destruction in order to eliminate the dangers".

HISTORY

The original Pension Regulations, published by authority of Order-in-Council P.C. 1334 of June 3rd, 1916, contained no reference to the question of pension where a disability had existed prior to enlistment, and where such disability had been aggravated by service.

This matter was discussed by the Special Committee on Pensions for Disabled Soldiers of the House of Commons in 1916. In its report to the House of Commons under date of May 10th, 1916 the Committee recommended:²⁴

That a member of such Force, on account of disability incurred on Active Service or aggravated thereby, be pensionable at the following rates for total disability (N.B.: Rates were listed hereafter).

However, the Pension Regulations which were enacted following the submission of this report to the House of Commons made no provision for conditions of pre-enlistment origin which had been aggravated during service.

Colonel C.W. Belton, Chief Medical Adviser to the Board of Pension Commissioners, explained the effect of the absence of this provision in the Regulations in a statement to the 1918 Parliamentary Committee, as follows:²⁵

We were establishing, or had to establish, a precedent, you might call it. There was nothing in the Order to guide us, absolutely that was so. We are told that a man is to be given a pension, and reading Clause 16, we, by analogy understood that he was to be given a pension for disability which is incurred on active service or which may have been aggravated on service, but it is not made plain that we should give it for the portion that is the aggravation on service, or for the whole disability.

HISTORY

Colonel Belton gave a further explanation to the Committee concerning the practice of taking the estimated percentage of a man's disability on discharge and deducting from that the percentage of disability which the Board of Pension Commissioners considered he had on enlistment, to determine the amount of pension. He explained this as follows: ²⁶

If we are sure that the man had disability before service, pre-existing conditions, and that that became aggravated by service, the pensionable part is the aggravation only...we are deducting the pre-service disability, but we must feel sure about it. Of course, we give the soldier the benefit of any doubt.

On February 12th, 1918, the Board of Pension Commissioners made the following regulation: ²⁷

In the opinion of the Board of Pension Commissioners Canadian pension regulations intend benefit of every doubt to be given pension applicants, especially if dependents are concerned....therefore, most disabilities or death, becoming apparent during service, are fully pensionable (fraud, gross errors on enlistment, and improper conduct excepted).

Cases of aggravation of conditions pre-existing enlistment (and of disabilities from improper conduct) will be considered individually. If applicant was apparently healthy at (and for some time before) enlistment and during more than three months of service, deductions from pre-existence of disability will be insignificant. This instruction to rule pending new legislation by next Parliament.

On April 2nd, 1918 the Board of Pension Commissioners made the following regulation:

It was resolved that disability or death, found to have been due to the aggravation of a condition which pre-existed enlistment, is pensionable as if wholly due to service when;

HISTORY

- (a) pre-existing condition was neither apparent nor wilfully concealed on enlistment, and did not become apparent for a reasonable time thereafter; or
- (b) the pre-existing condition, although apparent at enlistment, was considered to be negligible.

The Great War Veterans Association made representations to the 1918 Parliamentary Committee to the effect that:

Disability previous to enlistment or aggravation previous to enlistment shall not be considered in granting of a pension.

On May 10th, 1918, Mr. Kenneth Archibald, Legal Adviser to the Board of Pension Commissioners, wrote to the Honourable N.W. Rowell, Chairman of the 1918 Parliamentary Committee, stating that the suggestion of the Great War Veterans Association met with the approval of the Pension Board, and proposed the following amendment to the Pension Regulations:³⁰

That pensions be payable whenever a disability becomes apparent more than three months after enlistment or enrolment of a member of the Forces, provided that no pension be awarded for that portion of the disability which existed at the time of enlistment or enrolment, and was wilfully concealed, or was apparent or became apparent before the expiration of three months from the date of enlistment or enrolment.

In explaining the reason for this proposal Major J.L. Todd, member of the Board of Pension Commissioners, told the 1918 Parliamentary Committee:³¹

After a man has been in service for three months, we should consider that the man is whole, and pension him for everything. That is one of the most difficult points with which we deal, and our instructions are not sufficient.

HISTORY

The Parliamentary Committee recommended as follows:³²

That no deduction should be made from the pension of any member who had served in a theatre of actual war other than the United Kingdom, on account of any disability or disabling condition existing prior to enlistment, provided that the pre-enlistment disability or disabling condition had not been wilfully concealed by the member, or was not obviously apparent in said member at the time of enlistment.

The recommendation of the Parliamentary Committee differed from that of the Great War Veterans Association and the Board of Pension Commissioners, in that it limited the benefits of the provision to those who served in a theatre of actual war, whereas the proposal of the G.W.V.A. and Board of Pension Commissioners was to extend the provision to all the members of the Forces.

This recommendation of the Parliamentary Committee was adopted by resolution of the Board of Pension Commissioners on July 2nd, 1918 in the following form:³³

It was resolved that no deduction shall be made from the pension of any member of the Forces on account of disability pre-existing enlistment when such member of the Forces has served in a theatre of actual war.

The resolution was later implemented in the form of an Order-in-Council³⁴ which read as follows:

No deduction shall be made from the pension of any member of the Forces who has served in a theatre of actual war other than the United Kingdom on account of any disability or disabling condition existing prior to enlistment provided that the pre-enlistment disability or disabling condition had not been wilfully concealed by the said member of the Forces or was not obviously apparent in said member of the Forces at the time of enlistment. The words "theatre of actual war" as used in this Section and in Section 7(b) shall mean any country in which Canadian Naval or Military Forces are in contact with the enemy on land, or in the case of the Naval Forces any navigable water.

HISTORY

In 1919 this Order-in-Council was incorporated practically verbatim in Section 25(3) of the Pension Act³⁵, which read as follows:

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25(3) No deduction shall be made from the pension of any member of the forces who has served in a theatre of actual war on account of any disability or disabling condition which existed in him previous to the time at which he became a member of the forces; provided that no pension shall be paid for a disability or disabling condition which at such time was wilfully concealed, was obvious or was not of a nature to cause rejection from service.

In explaining the effect of this Section, the Honourable Mr. Rowell, Chairman of the Parliamentary Committee, gave the basis for the special provision under which no deduction is made for a pre-enlistment condition if the members of the Forces served in a theatre of actual war, as follows:³⁶

If a man reaches France, then he get a pension regardless of any pre-existing disability. That is the law as it stands in the pension regulations. There was this distinction before the Committee. A man is not entitled to a pension with respect to a pre-existing disability. In other words, the State compensates him for a disability sustained or aggravated during Service. The State is not under obligation to compensate him for a disability which existed prior to enlistment. But the Committee thought if the Army Medical Corps passed a man through and he is actually got to the Front, we should ignore any question of pre-existing disability and grant him a pension.

The annotation prepared by Mr. Archibald, Legal Adviser to the Board of Pension Commissioners dated July 1, 1919 read as follows.³⁷

For more than two years efforts have been made from various quarters to have pensions awarded in accordance with the disability existing in the man at discharge, whether the whole or a proportion of that disability existed in him at the time of enlistment or not. In the early years of the war owing mainly to the need, men were enlisted who while fit for the service for which they were intended were not absolutely fit from the point of view of occupation in the general labour

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market. Many were also enlisted who were not even fit for the less arduous of the duties of military life. Many of these unfits were discharged before leaving Canada; many more were discharged in England, only the most fit were taken to France. Again many men who were recognizedly unfit for service in the front line were enlisted in forestry, railway construction and other similar battalions.

The Parliamentary Committee of 1918 came to the conclusion that if any man reached a theatre of actual war it must be definitely presumed that he was absolutely fit upon enlistment unless it could be proved that there was a pre-enlistment disability which was concealed or was obvious or was of so minor a nature as not to cause rejection from service.

Example 1: A man develops tuberculosis in the trenches. It is shown that two years previous to his enlistment he had been in a sanatorium and treated for tuberculosis. He will nevertheless receive pension for the whole of his disability. The same man develops tuberculosis in England. He will only be pensioned for the aggravation of his disability.

Example 2: A man is enlisted in a forestry battalion with one eye out. He loses a hand in France. He will be pensioned for the hand, not for the eye. His disability was obvious.

Example 3: A man enlists with lessened acuity of vision in one eye by concealing his disability (looking at the chart with the good eye when being tested for the bad eye). Whether he gets to France or not he will not be pensioned for his eye disability. He concealed it.

Example 4: There were many very minor disabilities such as a slight touch of asthma, etc., which, whether taken note of by the M.O. at enlistment or not, would not have caused rejection from service. These minor disabilities might be pensionable if incurred during service but are not pensionable if they pre-existed enlistment whether the man concerned reached a theatre of actual war or not.

Your Committee has attempted to reconstruct hereunder the basis

upon which the legislators approved the provision that, if the member served in a theatre of actual war, no deduction would be made from pension for a disability incurred during or aggravated by service, where such was of pre-enlistment origin.

HISTORY

The Great War Veterans Association had recommended that any disability previous to enlistment not be taken into account and the member be pensioned as if such disability was wholly due to service.

It would appear that, in view of the letter written to the Chairman of the 1918 Parliamentary Committee by the Board's legal advisor on May 10th, 1918, the Board of Pension Commissioners was prepared to recommend that pensions be payable whenever a disability became apparent more than three months after enlistment, regardless of whether or not there was evidence of pre-enlistment origin, so long as the disability had not been wilfully concealed.

The 1918 Parliamentary Committee apparently took a more restrictive view of the matter and recommended that no deduction be made from pension for pre-enlistment disability, provided only that the member served in a theatre of actual war. The discussion* revolved mainly around the contention that, if the member of the Forces was accepted as medically fit on enlistment, it was improper for pension authorities to hold that he, in fact, had a disabling condition at that time, unless such condition was obvious or was wilfully concealed. Consideration was given to the question as to whether or not the medical examination on enlistment was sufficient to determine the existence of a disability. No clear cut answer to this question was forthcoming and it was apparently decided that the criterion should be whether or not the member was physically able to serve in a theatre of actual war. Accordingly, the Parliamentary Committee agreed to recommend that,

* See pages 185 and 189 hereof.

HISTORY

where the member served overseas in a theatre of actual war, it should be conceded that, regardless of any medical condition which may have existed in him prior to his service, he should be considered as being sufficiently fit, in medical terms, to serve his country. Therefore, any extention or aggravation of a pre-enlistment disability would be considered, in effect, as being wholly pensionable.

Later, with respect to this measure, Mr. Archibald stated to the Royal Commission on Pensions and Re-establishment: ³⁸

At the time I cannot tell you what the Parliamentary Committee meant by it or what I meant by it except that I said to myself: 'A soldier goes to the Front and he is supposed to be A-1. He must be alright unless it is obvious'.

The annotation to the 1919 Act, ³⁹ included the following explanation, which, in the view of your Committee, appears to be the major justification for the adoption of the special provision for those who served in a theatre of actual war:

The Parliamentary Committee of 1918 came to the conclusion that if any man reached a theatre of actual war it must definitely be presumed that he was absolutely fit upon enlistment unless it could be proved that there was a pre-enlistment disability which was concealed or was obvious or was of so minor a nature as not to cause rejection from service.

Section 25(3), as enacted in 1919, was amended in 1923 ⁴⁰ and became Section 11(1)(b) which read as follows:

No deduction shall be made from the degree of actual disability of any member of the Forces who has served in a theatre of actual war on account of any disability or disabling condition which existed in him at the time at which he became a member of the forces; provided that no pension shall be paid for a disability or disabling condition which at such time was wilfully concealed, was obvious, was not of a nature to cause rejection from service, or was a congenital defect.

HISTORY

The amendments are underlined above. The first amendment substituted the words "the degree of actual disability" for the word "pension". The second amendment added the words "or was a congenital defect".

The question of pre-enlistment disabilities was reviewed by the Royal Commission on Pensions and Re-establishment (1922-24). Representatives of ex-servicemen's organizations had recommended that the provision that no deduction be made from the degree of disability on account of a pre-enlistment condition be extended to ex-servicemen who had served in England or Canada.⁴¹

The Royal Commission recommended:⁴²

The spirit of Section 25(3) was that all those who served in a theatre of actual war should be presumed to have been physically fit on enlistment, and the Pensions Board could not minimize the degree of disability existing at discharge by showing that part of such disability existed on enlistment.

This section is admittedly a generous one, and the Commission considers its further extension not warranted.

1928 Parliamentary Committee on Pensions and Returned Soldiers' Problems

There was an interesting discussion concerning pre-enlistment disabilities at the 1928 Parliamentary Committee. This discussion led to the eventual introduction of the benefit of the doubt clause two years later.

Some of the relevant discussion is recorded below:

Capt. C.P. Gilman, representative of the T.B. veterans section of the Canadian Legion, proposed an amendment to the Pension Act as follows:⁴³

Section 11 be amended by the addition of the following provisions:

HISTORY

That in all cases where disease is recognized by a responsible medical authority as being of slow and insidious onset and progression, and in which a possibility of service relationship exists, there shall be a prima facie assumption that such disease is attributable to or was incurred during a period of war service; provided that this presumption shall be rebuttable by clear and convincing evidence.

In explaining the proposed sub-section, Capt. Gilman stated that the amendment was to allow a presumption of disease and that it would not always be necessary to prove evidence of continuity.

Mr. E.W. McPherson, M.P., Portage la Prairie, pointed out that the amendment made it "a prima facie" case. He said: ⁴⁴

I would object to it from the stand-point of form, because you provide that this presumption shall be rebuttable by clear and convincing evidence. I do not think that is the proper way to work that, because there are well established grounds for rebuttal evidence. Even if you put the words 'clear and convincing' in, you do not gain anything, because it is a matter of opinion of those hearing the evidence. Either that rebuttal evidence is going to be sufficient to remove the prima facie case, or else it is going to fail and the prima facie case will stand. Your amendment would only leave it in the opinion of this same board, no matter how you word it.....It is the legal stand-point that will govern the decisions of the Board.

The Canadian Legion submitted the following Resolution to the 1930

Parliamentary Committee: ⁴⁵

1930

That in cases where deduction for pre-enlistment disability is permissible under the Act, such deduction should not exceed 10%, unless greater percentage of disability was obvious on enlistment, obvious within the meaning of the Act.

Mr. J.R. Bowler, General Secretary of the Canadian Legion, gave the reason for this as follows:

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This recommendation protects a member of the forces from excessive estimation of the degree of pre-enlistment disability. It is reasonable that no man accepted for service should be regarded as having had more than 10% of disability .

Colonel J.T. Thompson, Chairman of the Board of Pension Commissioners, told the Committee that the basis upon which the degree of the pensionable disability was estimated was based on "the combined length of service and the degree of disabled condition existing at the time he was discharged". In further explanation Dr. R.J. Kee, Chief Medical Adviser to the Board of Pension Commissioners, stated:⁴⁶

We try to make it uniform, the Commissioners decide the ratio. We take into consideration the report of his condition before he went in to the Army, the hospitalization in the Army, the length of service and the kind of service. Then they decide one-fifth, two-fifths, three-fifths, a half, three quarters, that is the way we arrive at it.

The comments of the Board of Pension Commissioners in regard to the Canadian Legion representations were contained in a memorandum to the Honourable J.H. King, Minister of Pensions and National Health, under date of March 12th, 1930.⁴⁷ These comments were:

This proposal is obviously unfair in so far that men who enlisted with 30%, 40%, 50% or more disability would only have 10% deducted from their disability on discharge, e.g., a man enlisting with a blind eye - on his discharge from the forces would be pensioned for that blind eye less 10%.

The recommendation of the Canadian Legion which was quoted in the proceedings⁴⁸ was different from that set out in the interim recommendations, quoted in Appendix 3 to these proceedings of March 27th, 1930. The interim recommendation was:⁴⁹

HISTORY

That deduction for pre-enlistment disability shall be reasonably limited, unless the percentage of disability was obvious on enlistment within the meaning of the Act.

The memorandum prepared by the Board of Pension Commissioners under date of March 12th, 1930, which dealt with those recommendations of the Canadian Legion, quoted the recommendation in the interim submission, and pointed out that the proposal was "obviously unfair" in so far that men who enlisted with 30%, 40% or 50% or more disability would only have 10% deducted from their disability on discharge.

The Canadian Legion's amended recommendation which was placed before the Parliamentary Committee* requested that deduction from pension should not exceed 10%, but contained the qualification that if a greater percentage of disability was obvious on enlistment within the meaning of the Pension Act, then the 10% limitation would not apply. Your Committee found no evidence of any comment by the Parliamentary Committee dealing with the amended recommendation.

The Special Committee appointed to investigate the administration 1932-33 of the Pension Act, which sat in 1932-33, made no reference to pre-enlistment disabilities. The reason for this may be that the scope of its enquiry did not extend to the sufficiency of the provisions of the Act.

The 1936 Parliamentary Committee on Pensions and Returned Soldiers' Problems dealt with the question of pre-enlistment disabilities. The Army and Navy Veterans in Canada submitted a resolution which called 1936 for a conference of "eminent medical specialists" from different parts of Canada to consider the disabilities of neurasthenia and diseases of insidious onset, as these relate to the service connection of these disabilities.

* See page 194 hereof.

HISTORY

In explanation Captain C.P. Gilman, Dominion Adjustment Officer of the Army and Navy Veterans in Canada, stated: ⁵⁰

What we are trying to prove is that any disability he had that was congenital was not 40%, when a man is 100% fit going in. When he has never been sick, always worked, goes to war and spends four years there with all the hospitalization he had -- gunshot wound in the head and a few other things, and he comes out disabled, how do they arrive at 40%?

The Parliamentary Committee of 1936 recommended as follows: ⁵¹

A proposal was made that the Pension Act should be amended so that those who are suffering from mental psychopathic or neuropathic disabilities, although such are considered to be of a congenital nature, might be pensionable to the full extent of such disability if there had been service in a theatre of actual war and aggravation of such disability had been shown. It was decided to recommend that the Minister of Pensions and National Health should convene a board of psychiatrists and neurologists to discuss the incidents of these conditions and the treatment necessary therefore.

So far as your Committee was able to determine, this recommendation was not acted upon.

The Canadian Legion made representations to the Special Committee on Pensions and War Veterans Allowance Acts, 1941, concerning pre-enlistment disabilities. Mr. J.R. Bowler, General Secretary, referring to the resolution placed before the 1936 Parliamentary Committee, stated: ⁵²

The Legion desires to draw attention to the proposal advanced to the special Parliamentary Committee of 1936 to the effect that Section 11(b) of the Pension Act be amended so as to provide that those suffering from mental, psychopathic or neuropathic disabilities, even though considered to be of a congenital nature, should be pensioned to the full extent of the disability if there has been service in a theatre of actual war.

HISTORY

Members of the Committee will remember that under Section 11(b) if a man served in France he is pensioned for everything he has on discharge, misconduct excepted, even though a portion of it may have been a pre-enlistment condition.

There are exceptions which are stated in Section 11(b), and one of the exceptions is if the condition is congenital. Reference to the printed proceedings of the 1936 Committee will show that this question was discussed extensively at that time. The Committee finally recommended that the question referred to a board of psychiatrists and neurologists, to be appointed by the Minister of Pensions and National Health. As no action appears to have been taken in respect to those proposed amendments, it is thought advisable to re-open the matter at this time, particularly in view of the interest displayed by members of the present Committee.

The problem very largely arises in respect to cases where service entitlement has been admitted by the Pension Commission for conditions coming within the scope of this category, that is, mental or nervous condition, but where subsequently the diagnosis is changed, and sometimes split up under various medical terminology. Cases illustrating this procedure are to be found in the 1936 proceedings and there are others.

A not uncommon result of such changes in diagnosis has been that conditions up to that time fully pensionable have been ruled to be of congenital origin. In other cases, where the diagnosis has been split, a substantial portion of the entire disability has been ruled to be of congenital origin. In both instances, the effect has been to bring about a change in the basis of entitlement usually accompanied by drastic reduction in pension. Under Section 11(b) even though the pensioner has served in a theatre of war, pension can only be paid on the basis of aggravation during service if the condition is congenital.

The 1941 Parliamentary Committee made no reference to this subject in its Report to the House of Commons. It did, however, deal with Bill 17 (Amendments to the Pension Act) which was referred for study by the House of Commons on March 6, 1941.

The Bill did not propose an amendment to the wording of Section 11(1)(c) in respect of pre-enlistment disabilities. However, the Parliamentary Committee met on five occasions in camera* to discuss

* Committee Sessions in Camera were held on May 13, 15, 16, 20 and 22, 1941 as noted in the Proceedings of the Special Committee on the Pension Act and the War Veterans Allowance Act.

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amendments and the Bill was returned to the House of Commons on May 26th, 1941, together with the Committee's Third Report.⁵³ The amended Bill proposed a new wording in Section 11(1)(c), in part, as follows:

No pension shall be paid for a disability which, at the time he became a member of the Forces, was wilfully concealed, was obvious or was recorded on medical examination prior to enlistment.

The annotation submitted with the amended Bill 17 contained no explanation for deletion of the words "was not of a nature to cause rejection from service or was a congenital defect", and inclusion of the words "was recorded on medical examination prior to enlistment". The Parliamentary Committee had recommended deletion of the words "was a congenital defect,"⁵⁴ but the Proceedings contained no reference to the other changes. The amended Bill 17 was given third reading and passed by the House of Commons without comment concerning this Section of the Act.

The other amendment to this Section was effected in order to differentiate between service in the two wars. The amended Section read: ⁵⁵

11(1)(c) No deduction shall be made from the degree of actual disability of any member of the Forces, who has served in a theatre of actual war during the Great War or during the war with the German Reich, on account of any disability or disabling condition which existed in him prior to his period of service in either of the afore-said wars; provided that service by a member of the forces in a theatre of actual war may only be counted for the purpose of this paragraph when it has been rendered in the particular war with reference to service in which pension has been awarded; and further provided that no pension

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shall be paid for a disability or disabling condition which, at the time he became a member of the Forces, was wilfully concealed was obvious or was recorded on medical examination prior to enlistment.

(Note: New wording underlined)

The Canadian Legion Brief to the 1946 Parliamentary Committee contained the following comment with regard to pre-enlistment disabilities: ⁵⁶

1946

Probably nothing has created more dissatisfaction amongst overseas service personnel than this extremely contentious matter. Section 11, subsection (1)(c) provides that "no deduction shall be made from the degree of actual disability of any member of the Forces, who has served in a theatre of actual war during the Great War or during the war with the German Reich, on account of any disability or disabling condition which existed in him prior to his period of service in either of the aforementioned wars, etc., etc." There are three exceptions in that no pension can be paid for a disability or disabling condition which, at that time he became a member of the forces, was "wilfully concealed", "was obvious" or "was recorded on medical examination prior to enlistment".

The general principle of the above is clear. However, the Committee will realize that when 24 percent of the men who have served in a theatre of war are discharged as "medically unfit", and advised by the Canadian Pension Commission that they are not entitled to disability pension, there is bound to be dissatisfaction. Further, of the claims granted, a substantial number have had deductions made from their actual degree of disability because they fall within the three classes, described above.

At the last Dominion Convention of the Legion held in Vancouver, this matter received a great deal of careful study; and the general opinion was that, when a man had completed six months service and was still considered to be fit to continue service, then absolute physical fitness should be presumed at the time of enlistment, subject to the exceptions in Section 11, subsection (1) (c).

HISTORY

Recommendation: That the Pension Act be amended to provide that, after a secondary medical examination held six months or later after enlistment, any disabling condition occurring thereafter should be considered as having been incurred during service and attributable thereto.

The clarification of the Legion's view with regard to pre-enlistment disabilities was placed before the 1946 Parliamentary Committee in these words: 57

The Canadian Legion, on the suggestion of the House of Commons Committee on Veterans Affairs, have given careful study to the recommendation submitted to the Committee regarding pre-enlistment conditions and the matter of disability pension under Section 11, subsection (1)(c) of the Pension Act.

In order to make our recommendation more clear, it is recommended as follows:

That Section 11, subsection (1)(c) of the Pension Act be amended by adding the following clause immediately after this subsection.

except where aggravation of a disabling condition existing prior to enlistment has occurred during service, the deduction from the actual degree of disability shall not exceed 10 percent.

Section 11, subsection (1)(c) would then read:

No deduction shall be made from the degree of actual disability of any member of the forces, who has served in a theatre of actual war during the Great War or during the war with the German Reich, on account of any disability or disabling condition which existed in him prior to his period of service in either of the aforesaid wars; provided that service by a member of the forces in a theatre of actual war may only be counted for the purposes of this paragraph when it has been rendered in the particular war with reference to service in which pension has been awarded; and further provided that no pension shall be paid for a disability or disabling condition which, at the time he became a member of the Forces, was wilfully concealed, was obvious or was recorded on medical examination prior to enlistment;

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except where aggravation of a disabling condition existing prior to enlistment has occurred during service, the deduction from the actual degree of disability shall not exceed 10 percent."

The 1946 Parliamentary Committee received evidence from Mr. H. Parker, Permanent Secretary of the British Ministry of Pensions, concerning the United Kingdom legislation in respect of pre-enlistment disabilities, who quoted a White Paper read in the British House of Commons in July, 1943, as follows:⁵⁸

His Majesty's Government accepts the view that the fact that a man is accepted for service in the present war in a certain medical category may be taken as presumptive evidence that (a) at the time of acceptance he was fit for the kind of service demanded of a man in that medical category; and (b) in the event of his being subsequently discharged on medical grounds any deterioration in his health which has taken place is due to his service. While the Minister of Pensions will pay regard to any other evidence, including the consensus of medical opinion regarding a particular disease or group of diseases, which throws doubt on the presumptive evidence of the medical category in which a man was placed at the time of his acceptance for service, or on the presumption that service has played a part in the onset or development of the disablement, he will give full weight to the general view expressed above.

The Parliamentary Committee discussed the interpretation of the term "wilfully concealed" contained in Section 11(1)(c) of the Act. Mr. H.A. L. Conn, Deputy Chairman of the Pension Commission, tabled a memorandum addressed to the Chairman of the Canadian Pension Commission which read in part as follows:⁵⁹

This subsection evidenced an attempt to make special provision in regard to members of the forces who have seen service in a theatre of actual war, I may say this is the one section which differentiates in favour of the men who did the fighting.

HISTORY

In the case of one who has served in a theatre of actual war, whose injury or disease, in existence on enlistment has been aggravated, compensation shall be paid to the full extent of the disability from time to time, no deduction being made in respect to the condition existing at the time of enlistment, unless the disability was wilfully concealed, was obvious, or was recorded on medical examination prior to enlistment. If he served in a theatre of actual war as defined by the Pension Act irrespective of what his condition was prior to enlistment he gets the whole thing subject to these three limitations.

The Commission's interpretation of this subsection permits, in the case of service in a theatre of actual war, full pension for disability, existing from time to time, subject only to deduction to the extent that the disability was present, and, among other qualifications, was wilfully concealed at the time of enlistment.

It might be observed that the term "wilfully concealed" appears in the Pension Act of 1919 and has been retained in that Act to the present day.

Might I state at the outset that "wilfully concealed" is not defined by the Pension Act but as it has been present in the Act all these years its application is fairly generally understood.

It does not mean fraud nor fraudulent, which terms imply criminal deception or trick to benefit financially or otherwise the deceiver.

The Commission interprets "wilfully concealed" to mean the denial at the time of attestation of the presence or prior existence of symptoms or conditions known to the person making such denials to be false, and which has resulted in the acceptance of such person for service when, in the opinion of the Commission, disclosure of the presence or prior existence of such symptoms or conditions might have led to his rejection or the lowering of his medical category.

There must be definite evidence of wilful concealment of disease before a finding of "wilful concealment" is made against the soldier. Mere neglect to reveal or non-disclosure of, or failure to volunteer information does not, in the opinion of the Commission, constitute wilful concealment. Nor does the fact that he was discharged from the army after a first period of

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service on account of some disability or disabling condition constitute wilful concealment on his second enlistment, unless at the time of his attestation on second enlistment he denies his previous military service.

While it may be clear that an applicant for pension suffered from a disability or disabling condition prior to his enlistment, where he saw service in a theatre of actual war, he is entitled to be compensated for his entire disability when his condition has been aggravated during service unless his condition was wilfully concealed on enlistment. I am restricting my observations to wilful concealment. The onus is on the Commission to establish that it was "wilfully concealed" and the mere fact that it is conceded the disease pre-existed enlistment, which information was not revealed at the time of enlistment, is not alone sufficient to shift this onus.

The crucial factor in regard to "wilful concealment" is, did the applicant, when questioned on enlistment deny the existence of symptoms or conditions in order that he might be accepted into the Forces?

I notice it has been suggested to the Committee on Veterans Affairs that the term "not disclosed" should replace the words "wilfully concealed" as at present contained in Section 11(1)(c) of the Pension Act in order to remove any stigma which is attached to the latter expression. If this should be done, in order not to broaden the penalty imposed upon the veteran coming within the scope of this limiting phrase, it would seem essential that the words "not disclosed" should be defined in the Pension Act in such a way as to clothe those words with exactly the same meaning now given to the expression "wilfully concealed". The following definition in my opinion would accomplish this purpose. I have certain reservations about this definition, but it is the best I could do. "Not disclosed" means the denial at the time of attestation of the presence of prior existence of symptoms or conditions known by the person making such denial to be false and which has resulted in the acceptance of such person for service when, in the opinion of the Commission, disclosure of the presence of prior existence of such symptoms or conditions might have led to his rejection or the lowering of his medical category.

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The draft bill submitted to the 1946 Parliamentary Committee ⁶⁰ proposed insertion of "and deliberately" between the words "wilfully" and "concealed". The House of Commons approved this amendment and the proviso in Section 11(1)(c) of the Act, as amended, by Chapter 62 of the Statute of 1946, ⁶¹ read as follows:

And further provided that no pension shall be paid for a disability or disabling condition which, at the time he became a member of the Forces, was wilfully and deliberately concealed was obvious or was recorded on medical examination prior to enlistment.

The Canadian Legion presented a brief to the 1947-48 Parliamentary Committee which recommended the elimination of the exceptions under Section 11(1)(c) so that pension would be paid for the entire disability unless such was obvious at the time of enlistment. ⁶²

The Legion explained that the exceptions in the Act of "was wilfully and deliberately concealed" and "was recorded on medical examination prior to enlistment" had resulted in a situation of "insignificant statements made by the pensioner at the time of enlistment being magnified into admissions of pre-war disabilities which have not, in fact, existed."

The report of the Commission under the Chairmanship of the Honourable James J. McCann, M.P., made reference to pre-enlistment disabilities as follows: ⁶³

The Commission has carefully studied cases where the decision of the Canadian Pension Commission is in dispute - of either as to the propriety of the finding that the disabling condition existed prior to enlistment and was aggravated during service, or,

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in the case of an admitted pre-enlistment condition, as to the adequacy of the fraction of aggravation which the Canadian Pension Commission has granted. The Commission heard witnesses who gave different views on this subject. The Commission realizes that the relevant sections of the Pension Act are difficult to administer and is aware that efforts have been made over the past years to formulate more specific language to convey the intent of Parliament....The Commission holds the view that, even with an unchallenged record of a pre-enlistment incident, due weight should be given to the question of whether or not an appreciable disability existed at the time of enlistment in the Forces.....

In support of the Legion's stand, Mr. J.C.G. Herwig, General Secretary, submitted a recommendation concerning pre-enlistment disabilities as follows:⁶⁴

The recommendation is that pension shall be paid for the entire disability, of any man or woman who served in an actual theatre of war except only if it was obvious at the time of enlistment. Section 11(c) has been one of the most contentious since the termination of World War I. The principle of payment for the entire disability is established in the Act but is modified by the following exceptions, in which case pensions are paid only for aggravation: (a) if the disability is wilfully or deliberately concealed at time of enlistment. (b) disability obvious on enlistment. (c) disability recorded on medical examination prior to enlistment.

The Legion recommends the elimination of exceptions (a) and (c). The effort was made to soften the effect of (a) by adding the word "deliberately" in 1946 in order to give the Canadian Pension Commission wider powers in adjudication. The Legion, however, still believes that in the case of men who served in an actual theatre of war this exception should be entirely eliminated.

Exception (c) was even more contentious because even the most insignificant admissions by the pensioner at the time of enlistment have been interpreted to establish a pre-war disability.

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We would ask that the Committee recommend elimination of these exceptions which, in effect, destroy the principle of the section frequently on premises that cannot be accurately or credibly established.

Mr. Herwig read a letter, addressed to Mr. Walter Tucker, M.P.,

Chairman of the Committee, which stated in part:

It must now be clear that records existing even several years prior to examination for enlistment, if not disclosed, lay the veteran open to a charge of wilful concealment even if the record shows him to have been healed of his condition. On the other hand, if the charge of wilful concealment is not made, the fact that there was a record prior to enlistment, is still accepted as evidence of a pre-war condition, even if that evidence indicates that the patient was cured.

Wilful concealment is being interpreted as a failure to disclose some early childhood complaint or event which the veteran may not recall but may have been informed of by his mother. It is incredible to a layman that a disability occurring during war can be related to a childhood complaint of unknown or unestablished diagnosis or degree of severity, without some supporting medical evidence equally as conclusive as is required to establish a claim.

I enclose details of five cases taken from our files which illustrates the effect of the exceptions we object to, as they are now included in the Act. These are submitted for study by the Committee. We believe that the wording of this Section should be changed so that such interpretations cannot be made nor such presumptive conclusions drawn to the disadvantage of the pensioner on such flimsy evidence. The definition of obvious in the Act is so drawn as to indicate that the war condition must be apparent to the unskilled observer on examination. We believe that the interpretation of wilfully and deliberately concealed or of such unsupported admissions of a pre-war condition should be equally as credible to a layman. In none of the cases we enclose would a layman agree that the veteran had wilfully and deliberately concealed his disability or that any disability existed prior to enlistment of such admissions.

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With regard to records on medical examination prior to enlistment, the same observation applies. Recorded admissions by the veteran, unsupported by medical evidence, should not be regarded as records for the purpose of this Section. The Pension Commission will accept unsupported medical opinion based on such admissions, but will not accept a claimant's statement unless conclusively supported by medical records compiled during service. Equally conclusive evidence should be required to deny entitlement to pension for the entire disability on this count.

The 1947-48 Committee approved a resolution recommending an amendment to this sub-section of the Act which would have removed the exceptions as suggested by the Canadian Legion. In its Fifth Report to the House of Commons, under date of May 10th, 1948,⁶⁶ the Committee recommended an amendment to the Act as follows:

That Section 11(1)(c) of the Pension Act be amended by striking out all the words after the word "forces" in line 12 thereof, and substituting therefor the words "was obvious on enlistment".

The effect of this recommendation would have been to delete the proviso that a deduction may be made for a degree of aggravation which existed prior to enlistment if it can be shown that such condition was wilfully and deliberately concealed or was an obvious disability.

Only part of this recommendation was accepted by Parliament, with the result that the Act was amended, at the 1948 session,⁶⁷ to delete the words "was wilfully and deliberately concealed". The proviso then read:

And further provided that no pension shall be paid for a disability or disabling condition, which, at the time he became a member of the Forces, was obvious or was recorded on medical examination prior to enlistment.

HISTORY

The Act was also amended at the 1948 Session to provide the following clarification relative to pre-enlistment disabilities:

2(mnn) "recorded on medical examination prior to enlistment", includes recorded symptoms or findings in,

- (i) medical proceedings for enlistment,
- (ii) official documentation covering any former period of service,
- (iii) the files of the department
- (iv) Compensation Board or Insurance Company records,
- (v) hospital, private physician or other medical authority, where such record refers to the injury or disease resulting in the disability in respect of which the application for pension is made.

The Royal Canadian Legion, at its Dominion Convention, in May, 1958
passed the following resolution:

Resolved that Section 13(1)(a) of the Pension Act be amended so that where a pension applicant who served in a theatre of actual war is found to have a disability resulting from an injury or disease not recorded on medical examination prior to enlistment, such injury or disease shall be presumed to have occurred or had its inception subsequent to enlistment.

The Standing Committee on Veterans Affairs in 1958 devoted discussion to the question of pre-enlistment disabilities. Brigadier J.L. Melville, Chairman of the Pension Commission, commented on Section 13(1) (c), as follows: ⁶⁸

Mr. Macdonald asked me to say a word about pre-enlistment conditions. He knows very well that he poses a very difficult subject when he asks me to speak about that.

Later in the same Committee hearing the following exchange took place: ⁶⁹

HISTORY

Mr. W.H.A. Thomas, M.P., Middlesex, Ont: I wonder if Brigadier Melville can comment on the attitude of the Pension Commission in this regard in the case of a veteran who was taken into the Armed Services on a medical category of A 1 and later discharged with some disability. I have heard complaints to the effect that the Pension Commission would not accept his medical rating as shown on his admission into the Armed Services as valid evidence when considering his claim for pension .

Mr. J.L. Melville: I take it, Mr. Thomas, that you are dealing with what is sometimes referred to as "fit for service, fit for pension". A man prior to being enlisted into the forces is examined. As you know, all members of the forces are examined on enlistment. You know how complete these examinations are. It happens in many, many cases that within a very short time after that man has been enlisted certain disabilities become evident. We have many complaints from him. He is on sick parade all the time, and he gives a history which is the very same as the ordinary civilian when he goes to his doctor for medical attention and the first thing the doctor says is: "What is wrong with you; how long have you had it; how does it effect you". The problem the doctor is faced with is how to arrive at a diagnosis. When a member of the forces takes ill during service, the same thing happens. He will go to his unit medical officer or may be sent down to a field ambulance. He will be examined; these questions are asked and they form part of the record. He gives on his own volition a history of what happened to him long before his enlistment and when, following his discharge, the Commission considers a claim for that condition, we cannot ignore the evidence which is on record, Not the evidence placed on the record by the Commission, but a history given by the applicant himself during his service. If after consideration the Commission is of the opinion that the condition was pre-enlistment in origin and not aggravated during service, we so rule. But as I explained at the meeting of the Committee on Monday, if that veteran served in a theatre of actual war and that disability was not recorded at the time he enlisted and was not obvious at that time, then he is pensioned to the entire extent of the disability. That is a very favourable provision of the Pension Act, which affects all those who had service in a theatre of actual war. Service in a theatre of actual war for World War II was service anywhere outside of Canada .

HISTORY

These comments were made during consideration of the estimates of the Department of Veterans Affairs at the 1958 Parliamentary Committee. The Committee made no recommendation in its report regarding the pre-enlistment disabilities.

The Canadian Legion submitted a recommendation to the 1959 Standing Committee on Veterans Affairs as follows:⁷⁰

1959

Conditions not recorded on enlistment:

We request that Section 13(1)(a) of the Pension Act be amended so that where a pension applicant who served in an actual theatre of war is found to have a disability resulting from an injury or a disease not recorded on medical examination made on enlistment or prior thereto, such injury or disease shall be presumed to have occurred or had its inception subsequent to enlistment.

Whether or not a recruit is subjected to the dangers and rigours of military life is determined by government regulations. The government, for the purpose of determining whether the recruit is physically fit and is to be accepted, gives him a medical examination. The nature and extent of such examination is under the sole control of the state. The examination is very comprehensive and rigorous. The findings are recorded. On the basis of such findings the government determines whether the recruit is to be accepted for military service and whether he is to be subjected to conditions of service in a theatre of war. Having full control of the recruiting and the character and place of the recruit's subsequent service, the government should abide, for pension purposes, by its recorded findings in such medical examination, supplemented by actual medical records in existence prior to enlistment. This is not so under Section 13(1)(a). Many war disabled veterans notwithstanding the ameliorating provisions of Section 13(1)(c) undoubtedly are denied pensions which they would receive if the government were to abide by the results of medical examination on enlistment or pre-enlistment medical records. This situation is particularly acute in cases involving mental or nervous conditions. The Legion submits that the Pension Act should be changed so that Canada's obligation will be honoured.

HISTORY

The Canadian Legion therefore recommends:-

That Section 13(1)(a) of the Pension Act be amended so that, where a pension applicant who served in an actual theatre of war is found to have a disability resulting from an injury or a disease not recorded on medical examination prior to enlistment, such injury or disease shall be presumed to have occurred or had its inception subsequent to enlistment.

The discussion in the Committee with regard to this recommendation was, in part, as follows. 71

Mr. G.W. Montgomery, Vice Chairman: Are there any further questions? We will now pass on the Section 9 at page 208. "Conditions not recorded on enlistment". I believe that was partly covered in our discussion under Section 7. However, are there any questions on Section 9?

Mr. Jack McIntosh, Swift Current: The other day I asked how many applications had been refused in relation to the number of applications granted and I understood it was about two to one. Now, in this case, if this is carried and put through, I wonder how many of those one hundred and some thousands that have been turned down would be eligible.

Mr. L.A. Mutch, Deputy Chairman, Canadian Pension Commission: If you are asking me that question I may say that it is the considered opinion of the Commission that it would not change or add to the entitlement in a single case. This is not a new restriction. We are of the opinion that what is requested would not increase our powers under 13(1)(c).

The Legion's proposal would have given an applicant who served in an actual theatre of war the benefit of a presumption that, unless an injury or disease had been recorded on medical examination prior to enlistment, it must have occurred or had its inception subsequent to enlistment. This would have placed the Pension Commission in the position where evidence would be required to over-ride this presumption

HISTORY

otherwise, the condition could not have been ruled by the Commission to be of pre-enlistment origin.

The Canadian Corps Association presented a resolution to the Standing Committee on Veterans Affairs suggesting that the benefit of the doubt section be applied "in every case coming before the Pension Commission". In discussion of this case Mr. G.D. Clancy M.P., Yorkton, Saskatchewan, asked:

1961

In respect of the interpretation of the benefit of the doubt clause, do you not think it was the intention of Parliament that fit for service, fit for pension, would cover that?

Mr. L.A. Mutch, Deputy Chairman of the Canadian Pension Commission replied as follows:

In answer to the question about the benefit of the doubt and its slogan 'fit for service, fit for pension' that was never applied even by its most ardent advocates to that extent.

Concerning the question of pre-enlistment disabilities, Mr. Mutch stated further:

If he served in a theatre of war and there is a disability he is pensioned for the whole thing. If he did not serve in a theatre of actual war and it was recorded at the time of enlistment, then he gets a pension for the aggravation. It is not really as serious as you think. So far as the benefit of the doubt itself is concerned, again it hinges on the interpretation, and the interpretation which is given is so generous that it has been most successful. Some of the awards made under the benefit of doubt section, I feel sure, could never stand up in any court in the world.

COMMITTEE RECOMMENDATIONS

(23) That the Pension Act be amended as follows:

(a) To provide a presumption in Section 13(1)(a) in respect of a member of the Forces who served during World War I or World War II and in Section 13(2), or an amendment thereof, in respect of military service rendered in the non-permanent active militia or in the Reserve Army during World War II or in respect of military service in peacetime to the effect that the medical condition of a member of the Forces be that as indicated on his documents at date of enlistment, such presumption to be rebuttable by:

- (i) Any condition diagnosed within a period of three months of such date.
- (ii) Production of a record of medical examination prior to enlistment.
- (iii) The condition having been obvious at the time of enlistment.
- (iv) Medical evidence supported by opinions from practitioners not in the employ of the Canadian Pension Commission.

(b) To define "obvious" as it relates to this presumption, and to Section 13(1)(c), as meaning that which would be apparent, clear, plain, evident or manifest to the eye, ear, or mind of an unskilled observer on examination at the time the member enlisted for services in the Forces.

(c) To define "recorded" as it relates to this presumption, and to Section 13(1)(c), as meaning a record in writing containing findings or diagnosis by the authorities set out in the existing Section 2(u) of the Act.

Presumption:
Medical
Condition on
Enlistment to
be Accepted

Rebuttable By:

Condition
Diagnosed in
Three Months.

Medical Record
Prior to
Enlistment .

Obvious at
Enlistment .

Outside
Medical
Opinion

Definition
of Obvious

Definition of
"Recorded"

COMMITTEE RECOMMENDATIONS

(24) That the following practices be instituted in administration of the Act:

(a) An affirmative reply given by a person at the time of enlistment in regard to the existence of an injury or disease be considered as a record of the condition upon enlistment, only if the report of the medical examination confirmed that a residual disability from the injury or disease existed at that time.

Acknowledgment of Existence of Disability to be Confirmed by Medical Examination

(b) Proof of the existence and contents of a record be restricted to production of the actual record or where the record is lost by direct evidence from the person who made it.

Proof Restricted to Production of Record or Direct Evidence

(25) That the effect of these recommendations be retroactive, and the Veterans' Bureau be required to review files of persons who are refused pensions on grounds of pre-enlistment disability, to determine whether or not a new application should now be submitted in order to determine whether entitlement can now be granted.

Recommendations to be Retroactive

COMMENT

The issue before your Committee in regard to pre-enlistment disabilities was to determine whether or not the effect of existing legislation or the interpretation thereof represented a justifiable denial of rights to applicants generally and more especially to applicants whose service was not in a theatre of actual war.

Fit for Service - Fit for Pension

This slogan has been widely used to describe the condition that a member of the Forces who was enlisted as medically fit should have the benefit of an irrebuttable presumption that any condition which developed subsequent to his enlistment and while he was in the Forces was not of pre-enlistment origin. This proposal was first made in representations of veterans organizations immediately following World War I - and has been made many times since.

Your Committee is not prepared to recommend adoption of an irrebuttable presumption. There may be evidence brought to light, subsequent to the medical examination on enlistment, which would, in fact disprove the result flowing from the presumption.

Your Committee does consider, however, that there are ample grounds to warrant the adoption of a rebuttable presumption. This would mean that, in the absence of acceptable evidence to the contrary, the member would be entitled to the presumption that his medical condition on enlistment was, in fact, the condition as shown on his medical examination at that time.

COMMENT

The United Kingdom legislation contains what is referred to as a "provisional presumption" in favour of an applicant where a disability or death occurs not later than seven years after the end of war service. This presumption is found in Article 4 of the Royal Warrant of May 24th, 1949 * which reads as follows:

4. Entitlement where a disablement is claimed or death takes place not later than seven years after the termination of service.
 - (1) Where, not later than seven years after the termination of the service of a member of the military forces, a claim is made in respect of a disablement of that member, or the death occurs of that member and a claim is made (at any time) in respect of that death, such disablement or death, as the case may be, shall be accepted as due to service for the purposes of this Our Warrant provided it is certified that:
 - (a) the disablement is due to an injury which -
 - (i) is attributable to service; or
 - (ii) existed before or arose during service and has been and remains aggravated thereby; or
 - (b) the death was due to or hastened by -
 - (i) an injury which was attributable to service; or
 - (ii) the aggravation by service of an injury which existed before or arose during service.
 - (2) Subject to the following provisions of this Article, in no case shall there be an onus on any claimant under this Article to prove the fulfillment of the conditions set out in paragraph (1) of this Article and the benefit of any reasonable doubt shall be given to the claimant.

* Command Paper 7699, 1949

This Warrant confers benefits of the Army and Home Guard. Similar benefits prevail for members of the Navy, Airforce and Marines.

COMMENT

- (3) Subject to the following provisions of this Article, where an injury which has led to a member's discharge or death during service was not noted in a medical report made on that member on the commencement of his service, a certificate under paragraph (1) of this Article shall be given unless the evidence shows that the conditions set out in that paragraph are not fulfilled.
- (4) In the case of a member of the Territorial or Reserve Forces, the provisions of paragraphs (2) and (3) of this Article shall not apply to any claim made in connection with his service as such a member but -
 - (a) a disablement or death shall be certified in accordance with paragraph (1) of this Article if it is shown that the conditions set out in this Article and applicable thereto are fulfilled;
 - (b) where, upon reliable evidence, a reasonable doubt exists whether the conditions set out in paragraph (1) of this Article are fulfilled, the benefit of that reasonable doubt shall be given to the claimant.
- (5) Where there is no note in contemporary official records of a material fact on which the claim is based, other reliable corroborative evidence of that fact may be accepted.

The presumption in the British legislation, where a disablement is claimed or death takes place not later than seven years after the termination of service, is considered as sufficient to decide the claim in favour of an applicant unless evidence shows that the injury or death was not attributable to, nor aggravated by, service. The legislation provides that where an injury which has led to a member's discharge or death during service was not noted in the medical report made on that member on the commencement of his service, the disability or death shall be considered as due to service.

COMMENT

This presumption may be rebutted by medical opinion, by an admission by the member during service, or by determination that the disability was incurred during off duty hours. (Note: The British Ministry of Pensions legislation does not provide pension under the "insurance principle" as under the Canadian Pension Act.)

The Royal Warrant provides that, where the probabilities are so evenly balanced that it is not possible to come to a determination that the disability or death was the result of service, the claimant is given the benefit of the doubt under Article 4, Sub-section 2.

Where a disablement is claimed or death takes place more than seven years after the end of war service, the presumption does not apply and the onus of proof is on the claimant, but the claimant is given the benefit of a reasonable doubt as contained in the Royal Warrant, Article 5 (4) which reads as follows:

Where, upon reliable evidence, a reasonable doubt exists whether the conditions as set out in paragraph 1 of this Article are fulfilled, the benefit of that reasonable doubt shall be given to the claimant.

The interpretation placed upon the "presumptions" clause (Article 3(3)) was explained before the Canadian Parliamentary Committee on Veterans Affairs in 1946⁷⁴ by Mr. H. Parker, Permanent Secretary of the British Ministry of Pensions, as follows:

"The proper interpretation to be placed on that clause has recently been the subject of a pronouncement by the High Court, which has said that the correct interpretation is as follows. If a man is accepted for service in a certain medical category, there is a presumption that at the time of his acceptance he was fit for the kind of service demanded of a man in that category, and that in the event of his discharge subsequently on medical grounds due to deterioration in his health there is a presumption

COMMENT

that the deterioration was due to service. The High Court went on, however, to say that the presumption is not a compelling presumption but a provisional one. In other words, translating the legal language into what is more or less everyday language, what they said was that the presumption is not an irrebuttable presumption but is a presumption which can be rebutted, given that certain circumstances are satisfied. They said that the presumption is not a compelling presumption but a provisional one, and that in order to defeat the claim the evidence had to show a real preponderance of probability that the condition was not aggravated by war service. Put in other words, the presumption can be rebutted provided there is good and sufficient evidence to do it.

The United States Code of Veterans Benefits provides what is called a "presumption of sound condition" which reads as follows: ⁷⁵

Presumption of Sound Condition

311. For the purposes of Section 310 (basic entitlement) of this title, every veteran shall be taken to have been in sound condition when examined, accepted, and enrolled to service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service.

The United States Code sets out certain specific presumptions for veterans who served 90 days or more, to the effect that certain diseases which develop in an extent of 10% or more after separation from the service shall be considered to have been incurred or aggravated by service, notwithstanding there is no record of evidence of such disease during the period of service. These include:

- (1) A chronic disease within one year;
- (2) A tropical disease and disorders arising therefrom within one year or where incubation commenced during service;

COMMENT

(3) Active tuberculosis within three years;

(4) Multiple sclerosis within seven years;

These presumptions are rebuttable where there is evidence to establish that an injury or disease which is a recognized cause of any of them has been suffered between the date of separation and the onset of the disease or where the disability is due to the veteran's own wilful misconduct.

The presumption clauses in the pension legislation of the United Kingdom and the United States were studied, particularly in view of the frequent references made to these presumptions in evidence of those appearing before your Committee. These presumptions differ considerably from that being recommended herein, and they would not be applicable to the differing conditions of service in the Canadian Forces, and to the provisions of pension legislation.

The references to the British and United States legislation are included herein as information only, and have no direct bearing on the recommendations of your Committee.

Presumption Clause

The recommendation of your Committee is that the Pension Act should provide the applicant with a "built in" presumption that the Government will accept his condition, as it was determined by medical examination on enlistment, unless:

1. The condition was diagnosed within three months of enlistment.
2. The condition was obvious on enlistment.
3. There was a pre-enlistment record of the condition;
or
4. There is medical evidence within the intent of the Act to rebut this presumption.

COMMENTPresumption Clause

Your Committee notes the comment of the Deputy Chairman of the Pension Commission (see page 212 hereof) to the effect that, in so far as applicants who served in a theatre of actual war are concerned, a presumption of this nature "would not change or add to the entitlement in a single case". (The presumption to which Mr. Mutch referred was to the effect that an injury or disease would be presumed to have occurred subsequent to enlistment, unless its existence had been recorded on medical examination prior to enlistment.)

Any presumption as to pre-enlistment condition would be applied before the adjudicating body considered benefit of the doubt. It may well be that in many cases a benefit of the doubt could ultimately lead to the same result as would the application of the presumption. The presumption would apply on the first consideration of the application. It would relieve the applicant from the initial onus as to all matters of pre-enlistment origin not on his documents. If evidence within the exceptions was produced he would know what he had to meet. If it was not, the case would proceed with the Commission free from any requirements to refuse or make a deduction from pension because of evidence of a pre-enlistment condition.

In many instances the benefit of the doubt would not apply at this stage. In any event it would not serve to assure the applicant that the decision would inform him as to the nature of the evidence relied on in determining his condition as pre-enlistment. Application of the presumption should serve to give this assurance. Your Committee considers that this presumption should apply to all applicants regardless of where they served.

COMMENTPresumption Clause

The provision that no deduction would be made for a pre-enlistment disability (with certain exceptions) for those who served in a theatre of actual war was enacted in 1919 on the understanding that a member of the Forces who reached a war area was entitled to a presumption that a member of the Forces who reached a war area was entitled to a presumption that he was physically fit on enlistment.

It seems that the decision in 1919 to limit this benefit to those who served in a theatre of actual war was in the form of a compromise. The Board of Pension Commissioners, which at that time was responsible for administration of disability pensions, had recommended that pensions be payable whenever a disability became apparent more than three months after enlistment. This, in effect, would have given the applicant a presumption that, unless a condition became apparent within three months of his enlistment, the Government would accept his condition as that shown in his medical examination on enlistment. This presumption would be extended to all applicants, regardless of the area of their service. The recommendation was not accepted, presumably on the grounds that the medical examination on enlistment was not sufficiently complete to determine the existence of a disability. Hence, the compromise was reached that the criterion should be whether or not he was fit enough to serve in a theatre of actual war.

The Pension Act has not changed materially in respect of pre-enlistment disabilities since 1919, although there have been minor revisions concerning the type of evidence required to show that a disability was of pre-enlistment origin. The remarkable fact is that the controversy concerning this area of our pension administration has remained relatively

COMMENTPresumption Clause

constant for more than 45 years. In view of the legislation the problem is two-fold:

Persons who served in a theatre of actual war: For these it is contended that there should be a rebuttable presumption that medical condition was as shown on enlistment. This group is entitled to the benefit of Section 13(1)(c) which prohibits deduction for pre-enlistment disability (except under certain conditions). However, before becoming entitled to the benefit of Section 13(1)(c) the applicant must qualify under Section 13(1)(a) by showing a disability existed during service. This means that even though the Act contains special benefits for veterans who served in a theatre of actual war under Section 13(1)(c) this benefit cannot apply unless the veteran can establish entitlement, in the first instance, on the basis that his condition was of pre-enlistment origin and was aggravated by service. In this type of case the Pension Commission can rule that the entire condition was of pre-enlistment origin and was not aggravated by service, with the result that no pension would be granted.

Persons who did not serve in a theatre of actual war: Where the Pension Commission rules that a condition is of pre-enlistment origin, the result for the veteran who did not serve in a theatre of actual war is refusal of pension, even though the medical documents on enlistment may have contained no evidence of the condition. If the Commission rules that the condition, though of pre-enlistment origin, was aggravated by service, an arbitrary decision respecting the degree of disability which existed is arrived at, and a deduction is made from the total degree of disability as this class of veteran does not have the benefits extended under Section 13(1)(c). This is so, only because he did not serve in a theatre of actual war.

Your Committee considers that the applicant is entitled to the presumption that his medical examination on entering the forces was, in fact, an accurate reflection of his medical condition at that time. One desirable result of legislation to this effect would be that the Pension Commission would have to disclose the evidence used as a basis for a ruling that a condition was of pre-enlistment origin.

COMMENTPresumption Clause

Persons not familiar with pension adjudication might conclude that, although there is no presumption written into the Act, the effect of Section 70 (Benefit of the Doubt) would be sufficient to guarantee that pension be not denied unless the Pension Commission has sound evidence of the existence of a pre-enlistment disability.

Your Committee does not suggest that the adoption of a presumption clause in the Act would necessarily change the grounds upon which entitlement can be granted. As the Act is written now, the applicant is entitled to pension if there is attributability or aggravation. If there was a pre-enlistment condition, the State cannot be held responsible for payment of that portion of the disability considered to have been in existence prior to enlistment, with the added stipulation that if the man served in a theatre of actual war, a deduction for the pre-enlistment portion can be made only if the Commission can show that the condition was recorded on medical examination prior to enlistment or if the condition was obvious at enlistment.

Your Committee does consider, however, that this presumption in the Act would clarify the ground rules under which an application is considered in the sense that the applicant would be entitled to the presumption that his condition was as shown in his enlistment documents. In other words, one result of the adoption of the presumption would be to alter and clarify the procedure.

Without this presumption the applicant claiming pension for the type of disability which can develop from boyhood injury, or which is usually regarded as congenital or developmental, must contend with an understandable tendency on the part of pension adjudicators to consider these conditions as pre-enlistment origin.

COMMENTPresumption Clause

Your Committee is of the view that the spirit and intent of the Pension Act requires a reversal of this situation. All such claims would be approached from the standpoint that, unless there is specific evidence to the contrary, the condition was not pre-enlistment.

The suggestion of your Committee that the applicant is entitled to this form of presumption is based on the fact that, at the time of enlistment, the State assessed his medical condition. Persons applying for enlistment in the Armed Forces must rely entirely upon the medical staff engaged by the Government. They have no control over the type of medical examination or the methods used, and they are not entitled to see the results of that examination or to know the contents of their documents.

Your Committee has noted the evidence given by the Chairman of the Pension Commission concerning the type of medical examinations given on enlistment. Mr. Anderson stated as follows: ⁷⁶

The question then boils down to a simple difference of interpretation by the Commission and the Legion officers. The briefs suggest that if the examining medical officer does not make mention of the disability during the medical examination prior to enlistment then the condition could not have been obvious. The suggestion goes even further by stating that if the medical examiners says the disability is apparently not very important, then the disability cannot be considered as pre-enlistment.

The facts, however, show a different picture. During the war emergency recruiting officers were given certain quotas to meet. Recruiting and examining officers were well aware of the fact that few, if any, volunteers were perfect physical specimens. If they chose to reject every volunteer because of some minor disability they would have enlisted very few men indeed. There was a war on. Men were needed and if minor disabilities such as varicose veins, haemorrhoids, bronchitis, etc., were going to interfere with the winning of the war, then they must be disregarded, and disregarded in many cases they were. There was always

COMMENTPresumption Clause

something a man with psoriasis, or varicose veins, or haemorrhoids, could do to help the war effort, and many of the men who had these disabilities did an excellent job. They did not necessarily mean, however, that their disabilities were not pre-enlistment. In most cases such disabilities were recorded at the pre-enlistment medical examination. In other cases they were in fact, obvious to the eye of an untrained observer, but were not recorded even though the volunteer himself admitted having the disability. One does not have to be a doctor to recognize varicose veins, psoriasis, or deafness. Also if the man admits that he has had any of these conditions, for many years prior to enlistment, surely one cannot argue logically that the condition is not pre-enlistment. After all the Commissioners are expected in their days' work to use common sense and the real question here surely is, did the man, or did he not have this condition before he enlisted?

Your Committee realizes that there was a disparity in the standards of examination from time-to-time, place-to-place, service-to-service and unit-to-unit. The question here, however, is one of responsibility. It cannot be said that the applicant was in any way responsible. In your Committee's view, if records are faulty, limited or unavailable, the applicant should not be penalized. The State should accept the verdict of that medical examination, regardless of the circumstances under which it was carried out. This view is subject to some qualification. There should be a reasonable hiatus following enlistment during which a medical condition could have been diagnosed; otherwise the presumption should be that his condition was that as shown on his documents at enlistment unless it was obvious, or was recorded on medical examination prior to enlistment.

Your Committee noted that the original recommendation of the Board of Pension Commissioners in 1919 contained a three month "waiting" period during which a condition would have to become apparent, otherwise no deduction would be made from pension for any portion of disability which

COMMENT

Presumption Clause

was of pre-enlistment origin. This three-month period was suggested to overcome any objection that the medical examination on enlistment was faulty.

Obvious at Time of Enlistment

Section 2(q) of the Pension Act defines "obvious" as that which would be apparent, clear, plain, evident or manifest to the eye, ear, or mind of an unskilled observer on examination. The Pension Commission, under date of November 1st, 1948, (see page 167 hereof) interpreted this in the applicant's favour, by holding that it is applied to the disability or disabling condition only at the time of his becoming a member of the Forces.

Your Committee recommends that the definition of "obvious" in the Act be amended to make it clear that it relates to the time of enlistment. By placing this definition in the Act it would apply to Section 13(1)(a) in the same manner as it now does to 13(1)(c). Hence the member who did not serve in a theatre of actual war would have the benefit of this interpretation.

Your Committee received some complaint to the effect that the Commission was applying an overly-strict interpretation to the meaning of "obvious" in the Act. Your Committee considers that no legislative amendment would improve the situation. The Commission must necessarily have discretion in adjudging whether or not a condition was obvious.

Recorded on Medical Examination Prior to Enlistment

Your Committee finds that the Pension Commission may be placing undue emphasis on the possible existence of a pre-enlistment condition, based on a record of a medical examination prior to enlistment. The Act provides in Section 2(u) that this medical examination includes both an examination prior to enlistment and medical proceedings at the time of enlistment. This poses two separate problems.

COMMENT

Records of medical treatment prior to enlistment: This is a difficult area. On one hand the Pension Commission must consider any genuine record as an indication that a pre-enlistment condition did exist. On the other hand, care must be taken to ensure that a casual visit to a doctor's office, or a hastily-considered answer to a medical questionnaire, should not necessarily be regarded as proof that a medical condition existed. Your Committee considers further than an entry by itself is of no value in determining the existence of a pre-enlistment disability, and the Act should be amended to provide that the only effective record would be documentary evidence which indicates definite findings or diagnosis of the injury or disease. Your Committee is of the opinion, however, that a record which shows only symptoms is not necessarily a reliable indication of the existence of a pre-enlistment condition. Hence your Committee has recommended that the meaning of "recorded" shall be limited to situations where there are findings or diagnoses.

Medical proceedings at time of enlistment: Your Committee agrees that a condition recorded at time of enlistment should be considered as a pre-enlistment condition and has made no recommendation in this regard. Your Committee suggests that extreme care be taken to ensure that proper interpretation is placed upon replies given by enlistees, and recommends that an affirmative reply, by itself, concerning the existence of an injury or disease prior to enlistment, should not constitute a record unless the examining doctor made a specific entry regarding the disability.

COMMENTMissing Records

The policy of the Pension Commission is that, where a record of a pre-enlistment disability has been lost or destroyed, satisfactory evidence of that record can be considered. This was decided at the general meeting of the Commission of December 23rd, 1952, to which reference has already been made.* This decision is stated in broad terms. It is the view of your Committee that where the actual record is not available, the resorting to other forms of proof as to its existence and content should be restricted. Records relied upon should be confined to those listed in Section 2(u) of the Act and, where these or authenticated copies of them are not available, resort should not be made to information supplied by anyone other than the person who was initially responsible for the preparation of the record. For example, reports of field investigators paraphrasing the comments of a physician should not be accepted. In such case the minimal requirement should be a statement from the physician himself, in writing.

It should be apparent also that a statement of this nature should be clear, comprehensive, and unequivocal if it is to be used as a basis to dislodge the presumption. In all matters pertaining to the record of a pre-enlistment medical condition, the existence of which can disqualify an applicant from full pension, the evidence should be available for examination. Your Committee does not consider that the presumption should be rebutted by an imperfect recollection of a medical or other witness concerning the existence of an old condition.

* See page 168 hereof

COMMENTReview by Veterans' Bureau

Your Committee is aware that, in many conditions for which application is made some 20 years after service, it could be difficult to establish attributability to or aggravation by service. Notwithstanding, such cases are entitled to the full benefit of the Act. In suggesting the enactment of a presumption in the legislation your Committee has all veterans in mind but realizes in practice it will have a wider application to World War II applicants who were turned down in the years immediately following World War II, on the grounds of a pre-enlistment condition. Accordingly, your Committee has suggested that this presumption be retroactive, and that all files where pension was refused on the basis of pre-enlistment disability be reviewed by the Veterans' Bureau at an early opportunity. As it is not practicable to forecast the amount of additional work that this will entail, power should be given to the Veterans' Bureau or other competent authority to assign priorities, and thus control the workload, if necessary.

Regular Force Service

The recommendation regarding a presumption applies to members of the Regular Force.* There are strong grounds for a presumption for these categories, that their medical condition was as shown on enlistment documents. Since their recruitment was not in a time of a national emergency (except for wartime enlistments) their medical examinations should have been thorough.

* Includes non-permanent active militia or the reserve army during World War II.

COMMENT

The presumption would not be applicable, in the case of the Regular and Reserve Forces, in the same degree as for members who served in war time. The pensionability of the former is restricted to injury or disease, or aggravation thereof, where the disability or death arose out of or was directly connected with military service. The pensionability for members who served in war time is covered by the "insurance principle" which means that death, disability or aggravation thereof need only to have been incurred during military service to be pensionable.

Accordingly, in respect of members of the Regular Force, it must be shown that the disability or death was in some way connected with service. In cases of disease particularly, pension entitlement cannot be granted to the same extent as for members who served in wartime, in whose cases it is necessary to show only that a disease had its origin during the service, regardless of whether or not it was caused by service conditions.

Notwithstanding, the presumption should apply to members of the Regular Force. Your Committee has recommended a replacement of the words "arose out of" and "was directly connected with" by the words "related to" as it applies to pensionability for members of the Regular Force. * Where the pension adjudicators are deciding whether a disability or death was "related to" military service, the presumption clause would apply in the same way as in adjudication of pensions for members who served in wartime.

* See Volume II, Chapter 12 on Regular Forces.

COMMENTGeneral

It would appear that one of, the largest, "grey areas" in respect of adjudication of applications under the Pension Act is that involving the non-theatre of actual war applicant who was certified on enlistment as medically fit, and who subsequently was found to have a disability of the type generally considered to be of insidious onset, of congenital origin or of the nature which develops with the ageing process.

A large body of medical opinion indicates that such conditions would have developed regardless of service. Understandably, there seems to be a tendency within the Pension Commission to find that these disabilities could not have been attributable to service, leaving only the possibility that they may have been aggravated during service. Where an "aggravation" ruling is given, the applicant who did not serve in a theatre of actual war has his pension reduced to that portion of his disability which the Pension Commission considers was aggravated by service. The applicant who served in a theatre of actual war may still be penalized by decisions of this nature, but he does have the protection of Section 13(1)(c) which states that, unless the disability was obvious or was recorded on medical examination prior to enlistment, no deduction may be made for any degree of the disability which may have existed prior to his service in the war in which his overseas service occurred.

The presumption proposed herein would in no way affect the application of Section 13(1)(c). If a presumption concerning pre-enlistment disability is successfully rebutted by evidence other than that the condition was obvious at enlistment, or was recorded on a medical examination prior to enlistment, the applicant would still have the benefit of Section 13 (1) (c),

COMMENTGeneral

in that no deduction would be made from his pension as a consequence of that part of the disability is ruled as being of pre-enlistment origin.

As an illustration, a veteran who served in a theatre of actual war might apply for a pension for a condition which was not shown on his enlistment documents as having any residual effect in him. If the presumption that his documents were accurate in this respect is rebutted by acceptable medical opinion, the presumption would not apply in his favour. The adjudicating body could then proceed to rule that, although the condition was pre-enlistment, there was some aggravation thereof during service. At this point the applicant, having served in a theatre of actual war, would have the benefit of Section 13(1)(c). That is to say, he would be entitled to full pension, even though the condition was only aggravated by service, unless in addition to the rebuttal evidence, there was a written record of a finding or diagnosis on medical examination prior to enlistment, or unless the condition was apparent, clear, plain, evident or manifest to the eye, ear, or mind of an unskilled observer on examination at time of enlistment.

As a matter of clarification, your Committee suggests that it is erroneous to refer to Section 13(1)(c) as a presumption. The index in the Pension Act lists this Section under the heading "Presumption - physical fitness". It is realized that this Section came into being as an alternative to providing the applicant with presumption that there was no pre-enlistment disability unless it was shown on his service documents at enlistment.

The Section has not been used, however, as a presumption, but rather as a clause to be applied at the conclusion of a case, when it is decided

COMMENTGeneral

that there was pre-enlistment disability in spite of the absence of any finding to this effect in the medical examination on enlistment. The effect of the clause is to provide a concession for the man who served in a theatre of actual war, so that no deduction would be made from his pension unless the condition was "obvious" or was "recorded" in the meaning of the Act.

To remedy the situation in regard to pre-enlistment disabilities, your Committee considers that it is necessary to go to the root of the problem, which is the lack of a basic presumption that his medical condition was that shown in his medical examination on enlistment.

The adoption of this presumption in the legislation, which would be based on the medical documents on enlistment controlled by the state, would relieve the applicant of an onus he should not bear. This would assist the non-theatre of actual war applicant in a fair and just way. It would also benefit the applicant who served in a theatre of actual war because the presumption would assist in establishing his claim under Section 13(1)(a) to basic entitlement in regard to attributability or aggravation in that the ground rules would be more in his favour.

PRE-ENLISTMENT DISABILITIES

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5. Ibid, Volume II, Page G-25.
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7. Ibid, Volume III, Page L-32.
8. Ibid, Volume III, Page L-41.
9. Ibid, Volume III, Page L-62.
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11. Ibid, Volume III, Page L-105.
12. Ibid, Volume III, Page L-107.
13. Ibid, Volume III, Page L-109.
14. Ibid, Volume IV, Page M-21.
15. Ibid, Volume IV, Page O-13.
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43. Proceedings, Special Committee on Pensions and Returned Soldiers' Problems, 1928, Page 85.
44. Ibid, Page 92.
45. Proceedings, Special Committee on Pensions and Returned Soldiers' Problems, 1930, Page 41.
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49. Ibid, Appendix 3, Page 95.

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52. Proceedings, Special Committee on Pensions and Returned Soldiers' Problems, 1941, Page 163.
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55. SC. 1941, C.23 Assented to June 14, 1941.
56. Proceedings, Special Committee on Veterans Affairs, 1946, Page 221.
57. Ibid, Pages 292 and 293.
58. Command Paper 6459, July 1943, quoted in Proceedings, Special Committee on Veterans Affairs, 1943, Page 424.
59. Proceedings, Special Committee on Veterans Affairs, 1946, Pages 440 to 492.
60. Bill 329, Section 9 (1), as passed by House of Commons, August 1st, 1946.
61. SC. 1946, C.62 Assented to August 31st, 1946.
62. Proceedings, Special Committee on Veterans Affairs, 1947-48, Page 4.
63. Ibid, Page 216.
64. Ibid, Page 301.
65. Ibid, Pages 301 and 302.
66. Proceedings, Special Committee on Veterans Affairs, 1947-48, Page 533.
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71. Ibid, Page 273.
72. Proceedings, Standing Committee on Veterans Affairs 1960-61-62, Page 266.
73. Ibid, Page 288.
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76. Proceedings of Committee Sessions, Volume IV, Page R-10.

CHAPTER 8

BENEFIT OF THE DOUBT

GENERAL

Section 70 of the Pension Act is generally referred to as the "benefit of the doubt" section. It reads as follows:

70. Notwithstanding anything in this Act, on any application for pension the applicant is entitled to the benefit of the doubt, which means that it is not necessary for him to adduce conclusive proof of his right to the pension applied for, but the body adjudicating on the claim shall draw from all the circumstances of the case, the evidence adduced and medical opinions, all reasonable inferences and presumptions in favour of the applicant.

This Section has been the subject of considerable discussion before your Committee and in other quarters over many years; therefore it is dealt with at length in this report.*

REPRESENTATIONS AND EVIDENCE

The Sir Arthur Pearson Association of the War Blind

In its brief this Association stated its dissatisfaction concerning the failure of the Pension Commission to apply the benefit of the doubt in decisions of the Pension Commission in regard to consequential disabilities.¹ This dissatisfaction referred to claims for entitlement for illnesses which the Association claimed were due to "frustrations, lack of recreational outlets and the nervous tuned-in tension that a blind person travels under every waking minute of every day."

The National Council of Veteran Associations in Canada

This group recommended:²

That action be taken to emphasize the responsibility of the Canadian Pension Commission in their administration of Section 70 of the Pension Act so that all reasonable inferences and presumptions shall be drawn in favour of any applicant for pension.

* The application of this Section by the Pension Commission is explained later in this chapter. (See pages 256 to 259 hereof)

Representations and Evidence

Comment: The benefit of the doubt Section, No. 70 of the Pension Act, was incorporated nearly 30 years ago to overcome difficulties of applicants for compensation in respect of disabilities related to war service. The onus of proof lies on the claimant, while the Government of Canada is custodian of the records. Many of the original records are missing as a result of enemy action, accidents in transit, human error, etc. Most of the First War and many of the Second War veterans now encounter difficulty in obtaining evidence. It is therefore imperative that full weight be given to their rights under Section 70.

Mr. J.C. Lundberg, speaking for the National Council, referred to the general type of case where leading medical specialists had given an opinion in support of an application for pension entitlement but where the Pension Commission accepted the opinion of the "Commission doctor" and refused to grant entitlement.

Toronto and District Ex-Servicemen's Advisory Committee

This group expressed the view that the benefit of the doubt clause was not being properly used by Appeal Boards of the Pension Commission and that the Commissioners do not appear to give favourable decisions in many cases where there is a great deal of doubt.³

They were apparently satisfied with the wording of Section 70 of the Pension Act but claimed that the intent of Parliament was not being followed in decisions of the Pension Commission. In illustration, they referred to the typical situation where a member, having been found medically acceptable on enlistment, was later found to have a disability, and entitlement was refused on the ground that the disability was of pre-enlistment origin. It was suggested that an official interpretation of the Section be issued for the guidance of veterans organizations.

Representations and EvidenceHong Kong Veterans Association

In a prepared brief this Association requested: ⁴

That the Canadian Pension Commission be given clear instructions to carry out the provisions of Section 70 and give in all cases their most careful consideration to the evidence presented, particularly the opinions of medical specialists.

This group made particular reference to rulings of the Canadian Pension Commission as to disabilities of pre-enlistment origin and submitted the following:

There shall be a presumption that an applicant's condition as recorded on his acceptance as a member of the Forces was in fact his condition at that time, and that any subsequent deterioration during service was due to such service.

Mr. Robert Lytle, a member of the delegation, stated that the meaning of the Section was that "if the Commission lacks evidence to the contrary he (the applicant) should be given the benefit of the doubt". He stated further that, due to the difficulty in obtaining medical records, the man should not have to provide conclusive evidence. He expressed the view, also, that the benefit of the doubt should apply to assessments, particularly where such were being appealed at a hearing conducted by one or more Commissioners under Section 7(3) of the Act.

This group requested that the benefit of the doubt should be clarified and applied in a more generous manner in adjudication of pension applications.

Representations and EvidenceCanadian Corps Association

Mr. E. J. Parsons, speaking for this group, expressed the opinion that the benefit of the doubt had not been fully applied in cases being adjudicated by the Pension Commission and suggested that "any reasonable doubt existing in the mind of an ordinary individual should be made the basis of favourable adjudication by the Commission".

With regard to the question of onus of proof, he took the view that the Section should assist the applicant in respect to the nature of the evidence he would be required to produce. He referred to the case where there was no record in the service documents as to the accident or illness but where medical and lay witnesses could be used, if available, and affidavit evidence would be acceptable. In other words, the purpose of the section included that of relaxing the strictness of the requirements of proof.

Mrs. Shirley Heesaker, Secretary of the Canadian Corps Association, expressed the opinion that the benefit of doubt clause implied that conclusive proof was not necessary, that this section of the Act provided the Commission with some latitude, and that, if the part of the section which stated the applicant did not have to "adduce conclusive proof" were left out, the section would be improved. As an alternative, Mrs. Heesaker felt that the proof required by the applicant should be "reasonable or almost conclusive".

The following exchange is quoted in further explanation of the interpretation of "conclusive": 5

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Judge Lindal: You said something a moment ago which I thought was very significant, you used the words "almost conclusive".

Mrs. Heesaker: Yes, sir.

Judge Lindal: Now, you haven't got conclusive evidence, and the words "almost conclusive" came to you; in other words, if those words were in there, you might draw the inference that if you haven't got conclusive proof you must have almost conclusive proof, and is that too strong?

Mrs. Heesaker: That is right.

Judge Lindal: That is the inference as she drew it. I thought it was very significant.

Army, Navy and Air Force Veterans in Canada

The brief of this Association recommended:⁶

That action be taken to emphasize the responsibility of the Canadian Pension Commission in their administration of Section 70 of the Pension Act so that "all reasonable inferences and presumptions" shall be drawn in favour of any applicant for pension.

Comment: The "Benefit of the Doubt" section, No. 70 in the Pension Act was incorporated some 36 years ago to overcome difficulties of applicants for compensation in respect to war service. The onus of proof was on the claimant, while the Government of Canada was custodian of records. Frequently records were missing due to enemy action, accidents in transit etc. At the present time the applicant for a disability pension now encounters difficulty in obtaining evidence. Invariably evidence from fellow-ex-servicemen and from non-medical witnesses in Canada is treated lightly, if not wholly ignored, the assumption being that there is influence by some relationship with the claimant. Furthermore, very often men were wounded in the front line or injured when no doctor was present. There has also been such circumstances as doctors in the dressing stations having

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been killed, records not having been kept, lost or blown-up in transit to headquarters. An indication that the wishes, of the Canadian Parliament was not being carried out, was demonstrated in the House of Commons when over 30 members of Parliament expressed the opinion that the true intent of Section 70 as established by the Government of Canada was not being adhered to. It has also been noted that when medical evidence on behalf of the applicant are obtained and presented as evidence, such evidence is disregarded in favour of opinions given by the medical men on the staff of the Canadian Pension Commission. We advocate that the full weight of the "Benefit of the Doubt" be given in the applicants rights under Section 70.

Mr. J. Ewasew, Dominion Vice-President, expressed the view that the principle of the benefit of the doubt was stated in the first half of the Section, which reads:

Notwithstanding anything in this Act, on any application for pension the applicant is entitled to the benefit of the doubt, which means that it is not necessary for him to adduce conclusive proof of his right to the pension applied for.

He felt that the second part of the Section was a directive to the body adjudicating the claim wherein it stated:

But the body adjudicating on the claim shall draw from all the circumstances of the case, the evidence adduced and medical opinions, all reasonable inferences and presumptions in favour of the applicant.

He suggested that the clause would be "stronger" if the two parts were joined by the conjunctive "and" rather than "but". In clarification of his interpretation, Mr. Ewasew stated that the first part of the section revealed the right to pension and that the second part "instructs the Commission" that it shall go further than the evidence and must take into consideration the medical opinions. Mr. Ewasew expressed the view that the words "conclusive" should be deleted from the benefit of doubt section and replaced by the words "preponderance of".

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In explanation, he said there should be "no graphical formula whereby his (the applicant's) evidence must equate with that of the Commission or contra". He suggested that the benefit of the doubt clause was "put there for a situation precisely after the credibility situation is over with, to help that veteran who finds himself in a situation standing under circumstances over which he never had any control, to provide the proof which otherwise would be required by the Commission".

In further explanation of his view, Mr. Ewasew went on to say that the benefit of the doubt clause should operate when "the scales are balanced" and "when you are in a situation you can't be either left or right from the balance, or the evidence is set off, and against that there is equal evidence, and that is expert evidence, and Section 70 comes to his assistance and it has not been done so in the past".⁷

He was of the opinion that the applicant must make a prima facie case and then "the onus would shift to the Department" and "unless the Department... can show conclusively that he is not entitled to it he should get that pension by virtue of Section 70, if it applied".⁸

He referred also to pre-enlistment conditions and stated that where a man was found medically fit on enlistment and was discharged with a lower category a special application of the benefit of the doubt would apply.

The Royal Canadian Legion

A large portion of the Royal Canadian Legion submission was devoted to illustrations of the application of Section 70. It stated:⁹

Representations and Evidence

We do believe, however, that proper application of Section 70 will resolve all problems arising under Section 13(1)(a) and 13(2), and will significantly reduce the need for implementation of the maximum provisions of Section 31 and 42.

The brief referred to a report adopted at the Legion Biennial Convention in 1960 which stated that there were a number of ways in which the Commission could "improve its operations and bring them in line with the intended purpose of the Statute". One of these, stated in the report, read: ¹⁰

- (b) Proper use of the 'Benefit of the Doubt' clause:
The Commission interprets this to mean that the veteran must create the doubt. The latter portion of the clause (Section 70) places upon the Commission the responsibility of drawing all reasonable inferences and presumptions in favour of the applicant and removes from him the necessity of conclusive proof of his right to pension.

In the brief it was suggested that the Pension Act should be interpreted in accordance with the provisions of Section 15 of the Interpretation Act ¹¹ which reads as follows:

Every Act and every provision and enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of any thing that Parliament deems to be for the public good, or to prevent or punish the doing of any thing that it deems contrary to the public good; and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.

The Legion brief suggested that the interpretation of Section 70 appeared to be the crux of most of the problems arising in the adjudication of claims. It referred to delays which the Legion considered to be caused by a reluctance on the part of the Commissioners to make use of Section 70 until the Appeal Board stage of adjudication. The brief

Representations and Evidence

also referred to what it termed "a great divergence of opinion" within the Commission regarding the interpretation of this section of the Act.

Reference was made to the interpretation of the legislation given by the Deputy Chairman before the House of Commons Committee on Veterans Affairs on April 9th, 1959. * It was claimed that this interpretation by Mr. Mitch was "contrary to the legislation which clearly states that the body adjudicating shall draw all reasonable inferences in favour of the applicant." The Legion stated: ¹²

This Section spells out what is meant by the phrase "benefit of the doubt". Our interpretation of the legislation is that the applicant is not called upon to prove his case absolutely, but upon presentation of a prima facie case the Commission must draw from

- (1) all the circumstances of the case
- (2) the evidence adduced
- (3) the medical opinions

all reasonable inferences and presumptions in each instance in favour of the applicant.

The brief cited a number of cases, most of which have resulted in entitlement being granted at Appeal Board, stating the belief "that this strengthens our contention that these claims should have been granted much earlier. The net result of this has been that the pensioners have lost, and the State has saved, thousands of dollars".

The Legion also cited a number of cases illustrating what it termed "unexplained delays". ¹³

The brief referred to a report of the Veterans' Bureau of the Department of Veterans Affairs which indicated "entitlement was conceded wholly or partially in approximately of 40% of claims considered at appeal reaching a high in excess of 50% for the fiscal year 1961-62."

* See page 306 hereof.

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The Legion claimed that these figures indicated "innumerable cases are not considered carefully enough in the Board Room", (when the decisions in regard to initial or second or renewal hearing are made).¹⁴

Mr. Donald M. Thompson, Dominion Secretary of the Legion, referred to the explanation given by the Pension Commission to the effect that an Appeal Board was sometimes necessary before entitlement could be granted because of the need for an opportunity to judge the credibility of witnesses. He told the Committee that the Legion appreciated that this could be true where the records were vague and incomplete, but would not necessarily be the case since World War II because "records were usually well-documented".

The Legion brief referred to the application of Section 70 to claims arising from military service in peacetime, stating the view that "the problems arising from Regular Force claims can be overcome by a more effective application of Section 70". A number of cases were cited.¹⁵

Reference was made, also, to the difficulties arising out of denial of pension by reason of a pre-enlistment disability. Such difficulty could be overcome by a more generous interpretation of Section 70.

In general discussion regarding the benefit of the doubt, Mr. Thompson stated that the Legion did not believe that this clause should be interpreted on the basis as claimed by Mr. Mutch, "that is to say, doubt must first of all be created then reasonable inference drawn".

Mr. Thompson expressed the view that "the purpose of its being there is to create a favourable climate for the applicant, a state of mind. That should really be the basis of operation of the Commission as they consider each item of evidence, medical opinion, and not as the Deputy Chairman

Representations and Evidence

has pointed out here, after there is a doubt they then shall draw reasonable inferences in favour of the applicant". Later, in his evidence, Mr. Thompson stated:¹⁶

It would seem reasonable to us in approaching the case that in reviewing the evidence, the medical opinions, that all of this should be looked at in a generous way, and early on, I would submit, there is no doubt because there has been no decision made and if these things are looked at in a positive way rather than in a negative way, then Section 70 applies throughout the consideration, but if we take the Deputy Chairman's interpretation and wait until you have the doubt and then apply the reasonable inferences, we suggest this is not the way the wording of the Act is written and to us it is clearly stated what the meaning of the benefit of the doubt is.

Mr. Thompson expressed the view that the applicant should be required only to present a *prima facie* case. At this point the Pension Commission, looking at the evidence and the condition, should draw inferences from all the circumstances. These would include where the applicant served, the availability of documentation and like matters. In response to questions, Mr. Thompson suggested that when a *prima facie* case had been made out, all reasonable inferences and presumptions should be drawn in the applicant's favour.

Mr. Thompson felt that the part of the section which provides that "the body adjudicating on the claim shall draw from all the circumstances of the case, the evidence adduced and medical opinions, all reasonable inferences and presumptions in favour of the applicant", amounted to an instruction as to how the benefit of the doubt could be applied. Mr. Thompson expressed the view that the Legion's interpretation of the Statute appeared to "fit in with the words of the Section". Also, it appeared in the view of the Legion "to reflect the attitude of the legislators".

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Mr. Thompson stated that the Legion was satisfied with the existing wording of the Section, but would "like anything that would improve the situation".

Mr. Jack McIntosh, M.P.: Mr. McIntosh informed your Committee that he did not consider it necessary to repeat his views on the benefit of the doubt, as these were available in his evidence before the 1963 Parliamentary Committee on Veterans Affairs, which studied the Bill C-7.¹⁷

Mr. McIntosh had stated before this Parliamentary Committee that he had obtained an interpretation of Section 70 (Benefit of the Doubt) from a lawyer which read as follows:¹⁸

The benefit of the doubt means that doubt that might exist in the mind of a reasonable man, the average man on the street. A judge does not apply a doubt that exists in his mind; he applies that which he considers would exist in the mind of a reasonable man if a reasonable man was sitting on the bench. The judge interprets the law to the best of his ability as a man learned in law; he looks at the facts and weighs them, tests them and doubts them, and he, the judge, imagines what a reasonable man sitting in the jury would do. In other words he applies the law as a learned man and considers the facts as a reasonable man. The conception that a reasonable man as a judge is a conception of British justice that is drilled into all law students, I understand. It is not unusual for a judge to say to an accused 'I have no doubt of your guilt; nevertheless, there is an element of doubt and under the law I must give you the benefit of it'. The judge here refers to the doubt an average man might have, a doubt that exists in the mind of a man in the street, not the doubt that exists in the mind of the judge.

Mr. McIntosh told the Parliamentary Committee that the interpretation used by the Pension Commission was "directly opposite to the interpretation of the Courts, and opposite to the intent of the Court and the intent of Parliament". He referred to the interpretation given by Mr. L. A. Mutch* and stated:

* See page 306 hereof.

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Well, I would challenge it. I would say that it would appear that members of the Commission have taken the attitude that they are supreme beings. They take the attitude that the applicant has had to prove his case beyond a reasonable doubt. The intent of Parliament and I would say of the law of the land in civil action only asks the applicant to produce a preponderance of evidence and in legal phraseology I understand that preponderance means just slightly over 50% , if it tips the scale in favour of the applicant then that is reasonable doubt and the applicant should be given pension.

Canadian Forces Headquarters

The brief submitted on behalf of the Chief of the Defence Staff suggested that "in most instances the Commission seems to be reluctant to give an applicant the benefit of the doubt". The brief stated that, although the evidence of an applicant was the only direct evidence, and that such was uncontradicted, the Commission resolved the doubt against the serviceman "without any apparent basis.....except possibly conjecture".

Captain A. O. Solomon, (Royal Canadian Navy) the Director of Personnel Legal Services, stated that Section 70 was difficult to understand and suggested that the Section would be more effective if it provided simply that the applicant was entitled to the benefit of the doubt. "The rest of it just seems to confuse," he said.

Captain Solomon was of the opinion that the benefit of the doubt should be used where the Pension Commission was weighing evidence at the conclusion of the case and was deciding "what to believe and what not to believe". He agreed that if doubt existed within the Commission, the benefit of that doubt should be given the applicant.

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Captain Solomon expressed the view, with respect to the Armed Forces, that he had not given any consideration as to whether the benefit of the doubt should be applied at successive stages of a hearing, or only when all the evidence was in and the final decision was being made.

He did conclude, however, that it amounted to a "matter of weighing evidence". He felt that the initial onus was on the applicant to make out a prima facie case, and that it would then be up to the Commission either not to believe what the applicant had said, or to override his case with other evidence.

Captain Solomon cited a specific case where evidence had been brought forward to indicate that a serviceman's death had arisen out of or was directly connected with service, and the Commission had ruled that this was "insufficient evidence". The Commission had no counter-evidence in the case, and hence its decision must have been based on conjecture that the serviceman had done some act to bring himself outside of the statute, or was adjudged to have been guilty of misconduct. Captain Solomon felt that the Commission had not drawn reasonable inferences and presumptions in the applicant's favour and, in view of the evidence in support of the application, the benefit of the doubt should have applied in his favour.

Captain Solomon referred to another case in which a serviceman had been injured in an accident involving a military vehicle. The Pension Commission had acknowledged that this serviceman was on duty, but had found insufficient evidence to relate the accident to military service.

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On questioning, Captain Solomon agreed this was an instance where the facts were not in dispute, but that the Commission had denied pension on a legal interpretation, based on the belief that misconduct was involved. Captain Solomon suggested that in this case, where the Commission could not relate the accident to military service, the applicant could still have been given pension under Section 70 of the Act.

The Canadian Forces Brief cited two cases¹⁹ where it was suggested that the benefit of the doubt should have been given, but "the Commission has not seemed willing to accept anything less than the strongest confirmatory evidence, even though in the circumstances, such evidence could not be reasonably expected".

In one case the Commission's decision had admitted that the condition was incurred during service but "there is no confirmatory evidence from the documents to support the veteran's claim". In the other case the Commission's decision accepted the fact that the applicant might have been required to perform an act which could have caused his injury but stated "because of lack of proper documentation, it was not possible to confirm that he was on duty at the time of the injuries."

In regard to these cases, the representatives of Canadian Forces Headquarters suggested that if the Commission desired confirmatory evidence or proper documentation, the Commission was "placing more than a *prima facie* onus" on the applicant and "reasonable inferences were not being drawn in favour of the applicant".

The Canadian Forces Brief suggested that the Pension Commission should interpret Section 70 more liberally. The following discussion, relative to this suggestion, is recorded hereunder:²⁰

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Mr. Justice Woods: Have you any suggestions as to how this Committee can effectuate the first portion of your suggestion here; that the Canadian Pension Commission should more liberally interpret the Sections? In other words how do you make an independent agency change its approach?

Capt. Solomon: That is a tough one, of course, sir.

The Chairman: I know you are trained in areas that do not have independent agencies.

Capt. Solomon: That is the basic answer.

So long as you have the Act the way it is written you can't make an independent agency change its approach other than by means of pressure such as pressures that come from this Committee or the Government through the Minister of Veterans Affairs or even public pressure. If the Act were changed that would be a different story.

Mr. C. W. Carter, M. P.

In a prepared brief Mr. Carter suggested that the following general principle should be applied with respect to the burden of proof: 21

With respect to the burden of proof, it rests initially with the veteran to supply some evidence as a basis for his claim. The burden then shifts to the Pension Commission to prove he is not entitled to pension. The burden of proof should not rest with the veteran to prove his entitlement. Very often it is beyond his financial means and his knowledge to provide the expert medical evidence to prove his case.

Mr. Carter expressed the opinion that, under the terms of Section 70, the burden of proof should not rest with the applicant, and that the Act, as written, could be interpreted this way by the Pension Commission.

Mr. Carter's brief suggested further: 22

Benefit of the Doubt - It is doubtful that the benefit of the doubt clause (Section 70) can be strengthened by a change of wording. In its present wording it means any doubt whatsoever. To modify it in any way would limit its application. When there is a conflict of opinion by medical experts the benefit of the doubt should be automatic.....

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Mr. Carter expressed the opinion that, where there was a conflict of medical evidence, the benefit of the doubt should be given the applicant, provided that the medical evidence supporting the application was provided by persons who were well qualified.

He felt also that the benefit of the doubt should apply at every stage of proceedings of a pension application.

L'Association du 22ième Régiment Inc.

In a prepared brief, this Association expressed the opinion that "the Canadian Pension Commission does not apply a proper interpretation to the benefit of the doubt". The brief stated, in part:²³

It would appear that this section was inserted in our Pension Legislation solely for the purpose of ensuring that, in the case where the applicant could not put forward a clear cut case due to lack of records, or due to a difference of opinion between Medical and Pension experts, he would still receive pension so long as he was able to show sufficient evidence to indicate that even though there was some doubt in his case, the application should be granted.

This Association is of the opinion that in far too many cases, the Canadian Pension Commission leaves the onus on the man to establish his pension claim, and where he is unable to establish that claim conclusively, he is turned down, despite the fact that he is able to put up a very good argument. The consensus among our membership is that the Commission places a legal interpretation upon this section of the Act, whereas the intent of Parliament is that a common sense attitude should be taken and the Act should be interpreted broadly in favour of the veteran, so long as he could bring forward some good reasons to support his application.

Mr. John R. Matheson, M. P.

Mr. Matheson suggested that the benefit of the doubt should be given the "widest possible interpretation". He stated that he could not believe that it was the intention of Parliament to impose upon the phrase "a restrictive meaning that lawyers ascribe to it".

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Mr. Matheson felt that the Pension Commission had been applying a "legalistic" view of Section 70. He felt that this was acceptable for persons trained in the law, but that the Commission was made up partly of persons without legal training and he suggested that those who have to interpret legislation who are not lawyers, tend to become "rigid" and "legalistic". *

Mr. Matheson stated his agreement with the opinion of the President of the Pension Appeal Board²⁴ to the effect that a reasonable prima facie case must be established by evidence of some convincing nature, "although not necessarily so strictly regarded as in an ordinary court of law, and if, as a result, there is reasonable doubt in the mind of the adjudicating body, this doubt should be resolved in favour of the applicant".

Mr. Matheson suggested further that the character of a man's service should be a factor and that, although this might be difficult for a person trained in the law to accept, he felt as a legislator, that it made "every bit of good sense that this presumption favourable to the applicant - this benefit - can be stretched and increased depending upon the character of the man's service".

Mr. Matheson suggested that the benefit of the doubt should be given "with respect to every possible factor, to every possible causal relationship, with respect to every possible indication as to quantum and where there is doubt at the end, the benefit of the doubt to the pensioner".

* Mr. Matheson is a lawyer.

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Mr. Matheson suggested that the benefit of the doubt should not be given the connotation, as in criminal law where there was a dispute between the Crown and a subject or citizen, and stated:²⁵

If the legislators were so foolish as to venture into the trap of the section - a wording - which inevitably merits this specific and clear meaning, then I think we have to look at the Act again and you have to consider re-drafting it, because I don't think that is what was intended at all.

In summing up his view, Mr. Matheson stated:²⁶

I am quite convinced that successive legislators have intended a very broad and generous interpretation.

I think that was what was intended in these simple words, that mean nothing to a layman, that every possible question will be resolved, whether it is causative in character or in the matter of quantum.

Canadian Pension Commission

Mr. T. D. Anderson, Commission Chairman, stated in a brief commenting on representations made to your Committee, that "if the Commission had been misinterpreting the Section, one might properly ask why no serious effort has been made to divest the Commission of its right under Section 5(5) of the Act to be the sole interpretator of the legislation".

The Commission Chairman explained the application of Section 70 as follows:²⁷

Section 70 provides that if, having considered the complete evidence pro and con, the Commissioners agree that the applicant should be entitled to pension, they grant that entitlement. If, on the other hand, they agree that the man is not entitled, they reject the claim. If there is some doubt as to whether the claim is just and proper or not, then they must draw all reasonable inferences and presumptions in the applicant's favour. Since the Commissioners, and only the Commissioners, can make the final decision, the doubt must, of course, be in their minds. Furthermore, it is not a question of

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invoking or not invoking Section 70. It is a section of the Pension Act, and must be considered by the Commission at all times. Again, under existing circumstances, the final word as to the interpretation of Section 70 rests with the Commission, and from the wide variety of interpretations placed upon it by an equally wide variety of people, I would suggest that it is a very good thing that someone has the final word as to its interpretation.

Mr. Anderson gave his interpretation of Section 70 as follows:²⁸

If the Commission, in deciding or adjudicating on a claim, are agreed that the applicant should be entitled to a pension then they grant it; if, on the other hand, the Commissioners are clear and have no doubt that the man is not entitled to it they reject the claim. If there is any doubt then Section 70 directs that they draw all reasonable inferences and presumptions in favour of the applicant.

He expressed the view that it would not be possible for the Pension Commission to promulgate an interpretation of Section 70, for the reason that Appeal Boards of the Commission must operate in an independent manner, and any attempt to establish rules or regulations might be to the advantage of the Chairman or the other Commissioners and to the pensions advocates, but "would be a very great disadvantage to the veterans seeking assistance".

Mr. Anderson stated that the Commissioners had a large measure of agreement among themselves as to the meaning of Section 70 and that their interpretation agreed with his own. This measure of agreement was arrived at by constant association among themselves and through discussion of sections of the Act. He told your Committee that, during his tenure as Chairman, no attempt had been made to obtain an opinion from the Commission Counsel regarding Section 70.

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He stated also that, to his knowledge, the Commission had never decided on any written interpretation of Section 70. He suggested that any interpretation laid down by the Committee would lead to dissatisfaction. His actual words were:²⁹

I think my point is that no matter what position you arrive at, and no matter what interpretation you place on it, somebody would be very unhappy.

Mr. Anderson's attention was drawn by your Committee to an interpretation given by Brigadier J.L. Melville, when he was Chairman of the Commission, to the 1946 Special Committee on Veterans Affairs, * and a further interpretation given by Mr. L.A. Mutch, Deputy Chairman of the Commission, in an appearance before the 1959-1960 Standing Committee on Veterans Affairs.** Brigadier Melville's interpretation was to the effect that affirmative proof of the applicant's right to pension was required in the first instance, and where there was evidence to the contrary, balancing one against the other, a preponderance of evidence could be against the applicant, but if reasonable doubt existed, entitlement could be granted. Mr. Mutch's interpretation was that reasonable doubt must exist in the minds of the Commissioners making the decision, and where there was creation of doubt, then reasonable inferences could be drawn in favour of the applicant. Mr. Anderson commented that he was "not convinced that those two views are in any serious conflict, nor are they at odds with my own particular reasoning".

He reported that the benefit of the doubt was applied at every level from the initial hearing to the appeal, and also in regard to questions of credibility.

* See pages 290 and 291 hereof.

** See page 306 hereof.

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Mr. Anderson gave the further view that the interpretation to the effect that if there was "any doubt" the claim would succeed did not apply in applications under the Pension Act. He agreed that the veteran did not require conclusive proof, and if reasonable doubt existed, the claim would be granted. He felt, however, that the problem arose as to what constituted "reasonable doubt" and stated that "what is doubt in my mind might not be doubt in your mind".

Mr. H.W. Herridge, M. P.

Mr. Herridge suggested: ³⁰

The Section should be strengthened and re-worded so that there is no question that the Commission, if there is any benefit of the doubt whatever..... awards a pension on that basis.

Mr. Herridge stated that he had "very little criticism" of the Pension Commission, and that the Act was well administered. He concluded: ³¹

My only criticism is based around, shall I say, the need for a more liberal interpretation of that Section, the benefit of the doubt.

The Honourable Gordon Churchill, P. C., M. P.

Mr. Churchill told your Committee that, when he was Minister of Veterans Affairs, he had discussed the interpretation of Section 70 with the Chairman of the Pension Commission. He stated that, during his term as Minister, there had been a lengthy debate in the House of Commons on the interpretation of Section 70, and that he had encouraged this debate as he wished to have an expression of opinion from interested Members.

Mr. Churchill stated that he had not found any instance where Members of Parliament had raised objection to the application of the benefit of the doubt clause in favour of the applicant.

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He gave the opinion that Parliament wished to do "as much as it possibly can" in recognition of the services of disabled veterans but that Members of the House of Commons were not satisfied that the Pension Commission was applying a generous interpretation to the benefit of the doubt clause.

Mr. Churchill said that he had not arrived at a satisfactory solution to the re-wording of the section and that "it hinges on the administration and interpretation by the Pension Commission itself". He was of the opinion that the benefit of the doubt clause should apply particularly to personnel who served in the First World War, and were "actively engaged in trench warfare and subjected to the perils of front line service".

He suggested further that the benefit of the doubt clause might be more applicable to First World War veterans than those who served in the Second World War, in that documentation for the latter was more complete. He felt, however, that the benefit of the doubt clause could apply particularly to survivors from the Hong Kong Force who were imprisoned by the Japanese from 1941 to late in 1945.

In summary, Mr. Churchill's views were that the benefit of the doubt section could be implemented properly only through a state of mind on the part of the Pension Commission and that its purpose was to "give a break to the service man, so that he is not obliged to get the last detail of legal evidence to support his claim". He implied that he would not be in a position to suggest an amendment to the Section because the interpretation depends on "the state of mind of the person who is considering it".

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He appreciated the difficulty of the members of the Pension Commission, but suggested that they should give a "generous interpretation of that section" and that if they were to come under criticism because they applied the clause too generously, "they would have a host of defenders in the House of Commons".

Mr. Jack Davis, M. P.

Mr. Davis stated that, in view of the wording of Section 70 dealing with the benefit of the doubt, the onus was not upon the veteran to prove his claim, but suggested that this was the practice in the administration of the Pension Act. He explained this as follows: ³²

I think that within the competence of what I might refer to as an average person or a layman, there is an onus on him to make a case, and I would not expect him to produce a technical or legal argument in depth. I would think he should make a reasonable case, within the limits of his own personal ability and experience.

He suggested that the veteran should make a "plausible case and that the onus of investigation or enquiry be the responsibility of the Crown and should be carried out at the expense of the Crown".

Mr. Davis referred to a case where a member of the Regular Force had contracted paraplegia but pension had been refused by an Appeal Board of the Commission on the grounds that the condition neither arose out of nor was directly connected with service. A doctor whom Mr. Davis described as "very competent" had given a technical judgment that the paralysis was attributable to service, but the appeal was rejected. He summarized his views in regard to this case as follows: ³³

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I think that the mechanics of the Pension Act, as regards the benefit of the doubt, have been properly observed. On the other hand, I think if there is any room for argument as between these professionals, then there is room for doubt, and I would say that the veteran in question should have the benefit of that doubt.

Mr. David Groos, M. P.

Mr. Groos stated in a prepared brief that it was difficult for the Pension Commission to "interpret what I have already called the fuzzy wording which was handed to them by Parliament". He expressed his concern that the onus to prove entitlement was being left with the applicant who had no means of producing written proof, and whose records were not always available. He summarized his views as follows:

In specifying this "benefit of the doubt" I think it was the intention of Parliament to allow the Canadian Pension Commission to deal with such cases without full evidence and I would urge them to do so with less hesitation than they now show.

Mr. Jack Bigg, M. P.

Mr. Bigg presented a prepared brief, in which he stated that attempts to improve and clarify Section 70 had been "without avail". He took this as an indication that the Pension Commission, as the sole interpreter of the Act, would apply such interpretations and restrictions as it deemed advisable.

In support of his brief, Mr. Bigg commented that there was inconsistency in the Pension Commission's interpretation and that the Commission "has not gone to the generous all the time".

Mr. Bigg stated further: 35

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It seems obvious that this Section is interpreted by the Commission in a variety of ways, perhaps depending on the attitude of mind of the Commissioner. Where the Commissioner is uninhibited by restrictive views, it is conceivable that he would apply this Section in a generous manner. Where, on the other hand, the Commissioner may be over-zealous regarding his role as the protector of public funds, he may very well fall back on certain words in the Act to strengthen his arguments as to why pensions should be denied. Some examples of this type of thinking are given below:

- (a) The clause contains the words "it is not necessary for him to adduce conclusive proof". The view may be taken, from these words, that although the applicant does not have to establish conclusive proof, he might have to establish what might be called "almost conclusive" proof. It is interesting that the benefit of doubt clause contains no such requirement, but the use of the word "conclusive" as an adjective could imply that he has to produce some proof.

The very fact that the degree of proof required is not stated leaves a great deal of discretion in the hands of a Commissioner who may be prejudiced against the case.

- (b) The clause contains the words "all reasonable inferences and presumptions". Here again the "generous-minded" Commissioner would obviously have a broad interpretation as to what is "reasonable". Another Commissioner could presumably give a negative decision, on the grounds that he did not consider the inferences and presumptions to be sufficiently reasonable.
- (c) The Act contains the words "on any application for pension". A Commissioner who was inclined to be constructive and helpful could say that this wording meant that the Commission would have to give "the benefit of the doubt" on all aspects of an application, including the amount of retroactivation and the amount of assessment. A Commissioner who took the opposite view of his responsibility under the Act could very well state that Section 70 applied only on the application for entitlement. (The Act does not define "application" but Section 57 does contain the words "the procedure governing applications for entitlement").

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Moreover the Act does not use the word "application" in connection with assessment of disabilities * or retro-activation.** So I claim here Section 70 has to be improved.

Mr. Bigg suggested that the benefit of the doubt should permeate all aspects of the Statute, including medical assessments and the question of credibility.

Mr. René Emard, M. P.

Mr. Emard stated, in a prepared brief, as follows: *

Benefit of Doubt - When I first became associated with this Pension Act, I was pleased to find that Section 70 of the Act provided a "benefit of the doubt" for the applicant. I was to learn, after correspondence with the Canadian Pension Commission, and after discussion with my colleagues in the House of Commons, that this clause does not apparently carry a forceful meaning in Pension Commission decisions.

It is noted that in discussions in the Veterans Affairs Parliamentary Committee, officials of the Pension Commission has given a number of interpretations. One of them is that the "doubt" must be created in the mind of the Pension Commissioners making the decision. Another interpretation is that the "doubt" under Section 70 of the Act does not carry the same weight as "doubt" in the Criminal Code, and that it is necessary for the veteran to produce the supporting evidence which will create something more than simple doubt and, in fact, there seems to be a general feeling among veterans that it is necessary for them to establish substantial supporting proof if they are to qualify for pension.

I am not a lawyer, and do not consider that I am qualified to suggest re-wording of this Clause.

I hope it will be sufficient if, in this Brief, I make the point that, in the opinion of many Members of Parliament, and in the opinion of veterans organizations, there is no true benefit of the doubt being given.

* See Section 28 of the Pension Act

** See Sections 31 and 42 of the Pension Act

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One can assume that, in a legislative act of this nature, where the words "benefit of the doubt" appear, the requirement upon the body charged with the responsibility to make the decision would be applied as follows:

- (a) The onus in the first instance is on the veteran to make application and prove his claim.
- (b) The Canadian Pension Commission then weighs the evidence on behalf of the veteran, as against the stipulations of the Pension Act.
- (c) If, on the basis of their knowledge of the Act, the Pension Commission finds a clear-cut case against the veteran, then they are empowered under the Act to turn down the application.
- (d) If, however, the case against the veteran is not clear-cut then I would assume that the veteran's application should be approved. This assumption is based on the fact that, under the Act, the veteran does not have to prove his case conclusively.

Medical Advisory Branch - Canadian Pension Commission

Dr. W.F. Brown, Chief Medical Adviser, told the Committee that the "spirit of Section 70" was exercised constantly by the Medical Advisory Branch.³⁷

Dr. J.A. Forrester, Commissioner, Canadian Pension Commission

Dr. Forrester stated, in his appearance before the Committee, that he viewed Section 70 as being a distinction between "possible" and "probable". He cited the example of a medical claim which may or may not have been attributable to service and stated that, whereas in many instances it was possible to say that the contention of the applicant was possible, the question was to decide whether or not it was probable. If the decision was to the effect that the contention was probable it might be possible to approve pension within the provisions of Section 70.

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In his own interpretation, he accepted the view that if, on balance, it appeared that the evidence was 60% against the claim and 40% for the case, he would be inclined to approve pension.

Dr. Forester stated that he had made use of the benefit of the doubt clause in attempting to resolve medical questions in favour of the applicant. He gave this example:³⁸

The ideal application of Section 70 is where you get a group of experts saying that the man's x-ray showed T.B. at discharge and another group which says that it didn't. There is doubt there, and it should obviously be resolved in the veteran's favour.

John R. Matheson, M. P.

Mr. Matheson, in his second appearance before the Committee on April 21st, 1966 recommended a revision of Section 70 to read as follows ³⁹

Notwithstanding anything in this Act, on any application, whether relating to entitlement, assessment or otherwise, the Commission shall draw from all the circumstances of the case, the evidence adduced and medical opinions, all reasonable inferences and presumptions in favour of the applicant. The applicant is entitled to the most liberal interpretation possible of each section of this Act and to the benefit of every doubt.

Mr. Matheson referred to an interpretation given by Mr. G.A. Baldwin, M. P. * in a debate in the House of Commons on February 9th, 1961. Mr. Baldwin had suggested that, in a dispute between the Crown and a citizen, when all the evidence had been introduced and it was difficult for the tribunal to formulate a decision then the benefit of the doubt must be given to the citizen as against the Crown. Mr. Baldwin had suggested that this was the intention of those who drafted Section 70 of the Act.

* See page 311 hereof.

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Mr. Matheson stated that this may have been the intention of the draftsman of the Pension Act, but that it was not "the feeling of the common garden-variety" Member of Parliament. He went on to suggest that the benefit of the doubt was more than a legal requirement, to be applied only when the body adjudicating the claim was faced with evidence supporting both sides, and was in doubt as to the proper decision. He pointed out that the last sentence of his proposed revision to Section 70 - i.e. The applicant is entitled to the most liberal interpretation possible of each section of this Act and to the benefit of every doubt - tended to destroy the interpretation that the benefit of the doubt clause was merely a legal requirement. It implied that the benefit of the doubt should be spelled out in terms which would be understandable "to every Member of Parliament and I think every layman" at each stage of the proceedings. In further clarification, he expressed the view that the benefit of the doubt clause should be freed "from all the sophisticated legal interpretation".

Dr. W.C. Gibson

Dr. W.C. Gibson, Research Professor of the History of Medicine, University of British Columbia, appeared before your Committee, at his own request, to provide information relevant to the Committee's study. In regard to the benefit of the doubt, Dr. Gibson suggested that a doubt could exist in medical questions, inasmuch as medicine was not an "exact science". He stated as follows: ⁴⁰

Not everything in medicine can be 100 per cent proven, and therefore, if it gets about 50 percent or better, I think the veteran has every right to get special consideration.

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Dr. Gibson expressed the view that the benefit of the doubt principle should apply equally to peacetime and wartime service.

Veterans' Bureau

In reply to a series of questions prepared by your Committee, Brigadier P.E. Reynolds, Chief Pensions Advocate, stated the views of the Veterans' Bureau as follows: ⁴¹

The provisions of Section 70 apply to all matters of pension adjudication which come within the definition of pension in the Pension Act.

The benefit of the doubt clause should apply in the preparation of recommendations by members of the Medical Advisory Branch of the Pension Commission.

Brigadier Reynolds said that, in the view of the Veterans' Bureau, the Commission did not extend the benefit of the doubt "as widely as it should be" and that the Commission did not give "sufficient weight to the applicant's statement, or to the lay evidence which is produced on his behalf".

The Veterans' Bureau cited three cases to illustrate that the Commission did not always extend the benefit of the doubt until Appeal Board hearings. ⁴² Brigadier Reynolds stated that the Veterans' Bureau had no official interpretation of this Section but that its meaning was discussed with pension advocates of the Bureau from time to time.

Mr. D.K. Ward, Deputy Chief Pensions Advocate, stated that the Bureau had avoided adopting a definition of Section 70, as such might be misinterpreted as the official view of the Department of Veterans Affairs. He gave his own interpretation as follows ⁴³

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The language used in the Section is, of course, capable of several constructions. The construction which appeals the most to me, however, is to follow the well-recognized rule of statutory interpretation of giving full effect to all the words used in the Section. If this construction is followed then in my view, the phrase "the applicant is entitled to the benefit of the doubt" is the dominant phrase in the Section. The remainder of the Section which defines "benefit of the doubt" is not intended to limit the meaning of the phrase to this definition, but rather to extend the meaning to rights which are not usually considered to be included in the phrase "benefit of the doubt". That is, I believe the Section means that the applicant is entitled to the benefit of the doubt and this right includes:

- (1) he is not required to adduce conclusive proof,
- (2) all reasonable inferences and presumptions are to be drawn in his favour.

This would mean that during all phases of the adjudicating process the applicant is entitled to have all reasonable inferences and presumptions drawn in his favour from the evidence adduced, and when all the evidence is considered and after all inferences have been drawn the applicant is entitled to the benefit of the doubt.

Mr. W.P. Power and Mr. D.G. Decker, Commissioners, Canadian Pension Commission

Messrs. Power and Decker appeared before the Committee in order to provide information from the viewpoint of the individual Commissioner. In regard to the benefit of the doubt, Mr. Power expressed the opinion that Section 70 should apply to all claims coming before the Commission except medical assessments, which should be decided on the basis of a medical examination to determine the extent of the disability.

Mr. Decker suggested that the Commission was using the benefit of the doubt to the fullest extent on Appeal Boards. He said he would "reserve judgment as to whether it has had the same use with respect to dependent and divided pension and so on. Unconsciously, it is used, but I could not answer truthfully to say that the benefit of the doubt is there in use at all times as in the other area"

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In regard to the application of Section 70 to medical opinion, Mr. Power stated that the benefit of the doubt should apply when the Commission, having heard the evidence, is required to decide from all the facts, including the medical evidence, that there are sufficient grounds for granting pension. "When we consider all the facts in the grounds themselves, this is where Section 70 has its part to play", he stated.

Mr. Power gave the following interpretation of the benefit of the doubt: ⁴⁵

There are two requirements here. First of all, the man is required to make his claim. Then he is required to produce a reasonable amount of evidence. But it is not required of him that he prove his claim.

Now, the area where everybody disagrees, or where it is impossible to define the exact extent to which this benefit should go is in the area, I think, between conclusive proof and what is to be considered sufficient proof.

Now, so far as I am concerned, I am inclined to go along with the theory that, if after having heard a case, and particularly the medical evidence, the medical opinion - if there is disagreement between the medical specialist and the medical opinion and the choice is obviously left open to the adjudicator as to which he should choose, he should obviously choose the one which favours the man. He should grant the man's claim. He should even perhaps go further than that and where, in his opinion - or it may just be a feeling that despite what is accumulated on the file, if you like, which is of an unfavourable nature to the veteran, the statements of the veteran, or the statements of his medical witnesses (or, if he has none, his lay witnesses) are still sufficiently convincing to outweigh the balance of expert proof, well then, I would even go along with this.

It is very difficult for me to pinpoint it any further than that. Somebody once said if there is a forty-sixty balance you can select the forty percent balance which is favourable to the man and go along with that. And I think this is fair.

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Mr. Decker stated: ⁴⁶

I find it difficult to explain what is "doubt" to me. except perhaps to illustrate that, if a man comes and tells a story that he had an accident at a certain point of time and there is no record, then I grant him the benefit of the doubt - if other things sort of add up to a true picture. I like to lean towards the men.

He added that he would ask himself the question "Is it flying in the face of reason to say so and so?" and if it were not, he felt that he was commissioned to decide in favour of the applicant.

In answer to a question as to whether the clause could be strengthened by revision, Mr. Power gave the view that the clause added sufficient weight to a claim to balance in the veteran's favour, if the claim had merit, but stated: ⁴⁷

On the other hand, it is a rather vague section in some ways, and various people refer to it as having various meanings. If you gentlemen, after having considered these things, feel that there is some positive way in which you can lay out ground rules, why, I am sure that everyone, including ourselves, would appreciate it.

Both Mr. Decker and Mr. Power agreed that if there were some way in which the Section could be made more precise, it would be welcomed, but that they were not prepared to suggest how it might be done.

Canadian Pension Commission

In his second appearance before the Committee, Mr. T.D. Anderson, Commission Chairman, commented as follows on the reason why the Commission had not set out a definite interpretation regarding benefit of the doubt: ⁴⁸

Well, I don't think it would be difficult to set down a definition of it, sir. For instance, I suppose you could say, well, we will agree that if the weight of evidence is more than fifty percent - is fifty percent or more in favour of the man, he is in under the benefit of the doubt; if it is less than fifty percent, he is out.

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This could quite conceivably be a good definition. I am quite sure that that statement right now is being disagreed with by many people sitting around this room, but this is a definition.

In fact supposing we did issue that definition I am not sure it would serve a very useful purpose other than to keep certain people out who are now getting in. This is my point in connection with all these definitions. I think this: ultimately the real effect they have is that they stop certain people who are now getting in from doing so.

I think it would not bind an Appeal Board if we were to make that definition. At least I hope it would not. I would not want to see the hands of the Appeal Board tied by such a definition as that or any other definition. I think they should be free to use their own judgment in deciding whether there is a doubt, to give the benefit of the doubt. This is the problem we are faced with.

I have no doubt we could define this and all other sections of the Act very easily, but I say again as I have said many times before, the result would be to deny people pensions who are now getting them because to define is invariably to restrict.

Mr. Anderson expressed the view that the Commissioners "set out to grant a pension if it can be granted, and surely this is applying the benefit of the doubt across the board".

In regard to the application of Section 70 to medical opinions, Mr. Anderson stated that the Medical Advisory Branch was required to provide the Commission with the medical facts of the case, "without bias or without prejudice one way or the other". He stated that this opinion did not always agree with the opinion of other doctors, and commented: 49

I am not sure that in the sense that the Commissioners apply Section 70, it could be applied if they were going to give us straight forward, honest replies here to what we want to know.

Mr. Anderson did state, however, that the Commission applied Section 70 to its evaluation of medical evidence.

Representations and Evidence

Mr. J.M. Forman, a Pension Commissioner* who appeared with Mr. Anderson, stated that he could not set forth his interpretation of Section 70 as an individual "because I believe that Section 70 applies to all aspects of the Pension Act so far as rendering decisions are concerned".

He stated that the Commissioners have "always used benefit of the doubt to the advantage of the man". In regard to medical opinions, Mr. Forman stated that if a medical man was in doubt, "I would have to look upon it as I do in my own mind, having heard a claim at appeal.... The man must get the benefit of your own doubt, in your own mind. You would have to lean in his direction. I think we would interpret the medical evidence presented the same way. If the medical man was in doubt, then of course we would have to give the benefit to the man". Mr. Anderson stated further: 50

If it is a good thing to define this or any other section of the Act, then I suggest that Parliament would have done so at the time when they drafted the legislation; they would have said in Section 70 instead of what they do say, "If the weight of evidence is fifty percent in favour or more, then the man should get entitlement, and if it is less than that he shouldn't." Surely this would be the reasonable thing to suggest. If this sort of thing is good, they would have put it in the Act to start with.

Mr. Anderson, in his concluding remarks concerning benefit of the doubt: 51

There is no question at all but that there is a difference of opinion among people as to just precisely what they are supposed to do under this, but I do not think this concerns me personally too much.

What I am concerned about is that they shall see that the man is actually given the benefit of the doubt. I don't know how they arrive at it, or how they reason it out does not concern me so long as they give it to him.

* Mr. Forman is now Deputy Chairman of the Canadian Pension Commission.

HISTORY

It would appear that the first recorded mention of "benefit of doubt" in Canadian Pension administration was in a ruling by the Board of Pension Commissioners on February 12th, 1918, which read as follows:⁵² 1918

In the opinion of the Board of Pension Commissioners, Canadian Pension regulations intend benefit of every doubt to be given pension applicants, especially if dependents are concerned. Therefore, most disabilities, or death, becoming apparent during service are fully pensionable, (fraud, gross errors on enlistment, and improper conduct excepted).

In a letter to the Honourable N.W. Rowell, M.P., Chairman of the Parliamentary Committee on Pensions, under date of May 16th, 1918, Major J.L. Todd, a member of the Pension Board, stated⁵³ in regard to the principle under which the extent of disability is estimated:

The benefit of every doubt is given to the soldier.

The report of the Special Parliamentary Committee on Pensions, Soldiers' Insurance and Re-establishment of 1922⁵⁴ included the 1922 following comment with respect to benefit of the doubt:

The Committee feels that the weight of opinion tends to show that decisions where any doubt exists are given in favour of the soldier. The Committee also feels that if the legislation was enacted defining in set terms the manner in which attributability should be considered or estimation of disability decided, the medical authorities in deciding on these questions would be bound by the terms of the definitions so proposed to be made, and in the event of doubt, might not be able to go outside the provisions of such definitions and thus also be unable to give more lenient consideration in favour of the ex-soldier. The Committee therefore considers it unwise by legislation to attempt to define the terms "attributability" or the method in which disability should be fixed, and prefers to have the same rest on medical advice on estimation.

The Committee, however, desires to call the attention of the officers of the Pensions Board to the careful consideration it has given as regard these subjects, and to urge that every effort be continued so that when any doubt exists on these subjects, the soldier is given the benefit.

History

The Report of the Royal Commission on Pensions and Re-establishment, 1923-24 (Report on First Part of Investigation, February, 1923) stated 1923
as follows:⁵⁵

While the applicant has the burden of proving his claim, the statement has been generally made before Parliamentary Committees, and it was repeated very emphatically on the investigation, that in dealing with applications for pension if there is any reasonable doubt the applicant is given the benefit of it.

This was carried to the extreme by one medical adviser who intimated that a very small fraction of doubt in favour of the man was sufficient to warrant pension. If this means anything, it is, not that the applicant has to establish his claim by a preponderance of evidence as in an ordinary civil case, but that it is enough if he can bring evidence to create in the mind of the tribunal dealing with his case a reasonable doubt as to whether his pension should be refused.

Sufficient has been shown, as evidenced before the Commission, to quite justify the conclusion that the statement that the applicant is given the benefit of any reasonable doubt cannot be taken as expressing by any means an invariable principle of pension administration. Numerous cases were presented in which, in the opinion of the Commission, there was clearly a reasonable doubt established in favour of the applicant, but pension was refused; and in many of these the applicant showed not only a reasonable doubt but a preponderance of evidence in his favour.

The Royal Commission Report, (Final Report on Second Part of Investigation July, 1924) stated as follows:⁵⁶

The subjects of "burden of proof" and "reasonable doubt" have been much discussed. It has been pointed out that the proposal does not really have to do with procedure, but with a most important matter of substantive rights. The burden of proof in one sense means the onus of bringing forward evidence. This naturally and properly is on the applicant. In another sense it means the degree of proof which the applicant is required to produce. The latter is particularly important in pension cases. It has been repeatedly stated * that if there is any reasonable doubt the applicant is given the benefit of it.

* See Report No. 1 Page 114.

History

The usual rule of law is that the person asserting a claim has to produce a preponderance of evidence. To give the applicant the "benefit of any reasonable doubt" means any greater concession than that given an ordinary litigant, must imply that the application for pension is entitled to succeed not simply if there is more evidence in support of his case than against it, but if he can bring sufficient evidence to create in the mind of the tribunal dealing with his case a reasonable doubt as to whether his pension should be refused. An obvious principle of pensions administration is that it is better to award pensions in some cases not strictly entitled than by a too close application of the rules of proof, to run the risk of depriving those to whom pension should justly be given.

The Royal Commission recommended as follows: 57

That in practice the applicant for pension be given the benefit of the doubt in the sense that pension is not to be denied if the applicant brings evidence sufficient to create in the minds of the tribunal a reasonable doubt as to whether pension should be refused.

The Great War Veterans Association submitted two suggestions in
 regard to benefit of the doubt to the 1924 Special Parliamentary Committee
 on Pensions, Insurance and Re-establishment of Returned Soldiers at the
 1924 Session of Parliament as follows: 58

1924

That more reasonable allowance be made for faulty documentation in instances where inaccuracy or omissions in documentation may convey any incorrect description of the condition of the applicant, of his statements, or of the circumstances of the origin or aggravation of the disability.

Argument - This suggestion applies, in the first instance, to entries with regard to weight or debility. Instances have been known where entries were made of weight solely upon an estimate. Subsequently these entries became of importance in order to determine the degree of debility. In other instances the man suffered injuries or contracted diseases which because of unusual circumstances were not recorded. In all such cases evidence of a corroborative character should be given greater weight. An incomplete or faulty documentation should not be allowed to deprive an applicant of the benefit of any reasonable doubt.

History

That the procedure be amended as to require the Department to undertake full investigation with regard to the statement of claim made by the applicant and that the burden of this responsibility be assumed by the Department entirely as regards dependents, and that at all times the applicant definitely be given the benefit of any reasonable doubt established.

Argument - It is frequently advocated that the burden of proof should be shifted to the Department. If this is done it may be objected that some years hence almost any ex-service man be able to establish a claim for pension. Furthermore it is argued frequently that if the onus is placed with the Department, the Department should also have the opportunity of taking advantage of any reasonable doubt as to the validity of the claim. It is believed that the interests of the applicant would be fully served if the Department would assume a larger measure of responsibility with regard to any investigations that may be necessary in the circumstances related by the applicant in an effort to substantiate his claim. Furthermore, in view of faulty documentation during the period of service, the applicant should be given the benefit at all times of any reasonable doubt. Officials of the Department should be definitely instructed as to methods of determining such reasonable doubt.

1928 Parliamentary Committee on Pension and Returned Soldiers' Problems

There was an interesting discussion concerning benefit of the doubt at this Parliamentary Committee. This discussion led to the eventual introduction of the benefit of the doubt clause two years later.

Some of the relevant discussion is recorded below:

Mr. C.P. Gilman, representative of the T.B. veterans section of the Canadian Legion, proposed an amendment to the Pension Act as follows:⁵⁹

Section 11 be amended by the addition of the following provisions:

That in all cases where disease is recognized by a responsible medical authority as being of slow and insidious onset and progression, and in which a possibility of service relationship exists, there shall be a prima facie assumption that such disease is attributable to or was incurred during a period of war service; provided that this presumption shall be rebuttable by clear and convincing evidence.

History

In explaining the proposed sub-section, Mr. Gilman stated that the amendment was to allow a presumption of disease and that it would not always be necessary to prove evidence of continuity.

Mr. E.W. McPherson, M.P., Portage la Prairie, a lawyer, pointed out that the amendment made it "a prima facie" case. He said:⁶⁰

I would object to it from the stand-point of form, because you provide that this presumption shall be rebuttable by clear and convincing evidence. I do not think that is the proper way to work that, because there are well established grounds for rebuttal evidence. Even if you put the words 'clear and convincing' in, you do not gain anything, because it is a matter of opinion of those hearing the evidence. Either that rebuttal evidence is going to be sufficient to remove the prima facie case, or else it is going to fail and the prima facie case will stand. Your amendment would only leave it in the opinion of this same board, no matter how you word it..... It is the legal standpoint that will govern the decisions of the Board.

On March 6th, 1930, the House of Commons passed the following motion:⁶¹

Thursday, March 6, 1930.

Ordered,---That the following proposed motion, viz:--

That in the opinion of this House, any ex-soldier who has served in any theatre of war, who applies for a pension or an increase of pension and submits evidence or an opinion from any reputable physician or surgeon in Canada, stating that his disability is directly or indirectly attributable to war service, the onus of disproof shall be upon the Board of Pension Commissioners and that unless the same be disproved a pension shall be granted to the said applicant, in accordance with the schedule at present in force under the regulations of the Board of Pension Commissioners.

and amendment, viz:--

That all the words after the word "House" in the second line be deleted and the following substituted therefor: "in all applications for pensions where disability or death is proved, such disability or death shall be presumed to have resulted from and to be attributable to military service unless and until the contrary be proved."

be referred to the Committee appointed to deal with all matters connected with Pensions and Returned Soldiers' Problems; and

History

That it be an instruction to the Committee that they have power to consider the advisability of giving discretionary powers to the Board of Pension Commissioners and the benefit of the doubt to the applicant for pension on the evidence adduced with respect thereto; and also to consider the advisability of applying the principles enunciated in the original motion and amendment.

Attest.

ARTHUR BEAUCHESNE,

Clerk of the House.

The first Benefit of Doubt clause was enacted on recommendation of the Parliamentary Committee on Pensions and Returned Soldiers Problems of the 1930 Session of Parliament. In his Report to the House, the Chairman, Mr. Charles G. Power, M.P., Quebec South, stated: ⁶²

In addition to the foregoing questions of organization and procedure the Committee proposes the enactment of a general rule governing the Commission, the Pension Tribunal and the Appeal Court, whereby all reasonable inferences are to be drawn in favour of the applicant, who is to be given the benefit of the doubt, the rule stating that the applicant is to be relieved from the obligation of giving conclusive evidence in favour of his right, an obligation which it is in many cases quite impossible for him to discharge.

In recommending the adoption of this clause to the House of Commons, on May 20th, 1930, the Minister of Pensions and National Health, the Hon. J.H. King, stated: ⁶³

This section in particular is well drawn; it is liberal in its scope and I believe its acceptance by Parliament will prove advantageous to soldiery, and will do much to ease the situation which has existed in this regard.

The Rt. Hon. R.B. Bennett, Leader of the Opposition, commented as follows:

So far as the general principle of giving the applicant for pension the benefit of the doubt is concerned, it will be observed that this Section clears up the difficulty, so far as the matter lends itself to reasonable

History

legislative enactment. The benefit of the doubt is, of course, a difficult term to define; it has never been defined easily. In cases which have engaged the attention of civil courts the judges in charge of juries have pointed out the circumstances of particular cases, and they have laid down the principle that if there be doubt upon the evidence, such doubt must be resolved according to certain rules dictated by the judges. In this particular instance, the circumstances, evidence and medical opinions are to be considered by the Tribunals set up by the Bill. Where there is reasonable certainty in the minds of Tribunal, where they can point to certain definite circumstances, and to medical opinions and the other evidence presented before them, they may be in a position to state clearly that there is no doubt as to the cause of the disability or the right of the applicant to pension. On the other hand, where there is wavering uncertainty as to whether or not the evidence to which I have alluded warrants a definite conclusion, then there is difficulty. To my mind that is the most distinctive section of the measure before us and I think it will meet with your approval; the psychological value of it not less than the monetary advantages it might result. Psychologically it will tend to bring a state of satisfaction which to the minds of applicants has hereto before been lacking; it will convince those applicants that after all the country is behind them solidly and that the only difficulty has been in setting up the machinery to enable the people of Canada to express themselves in concrete terms through the medium of this Statute. It will prove to those returned men that Canada is prepared to bring relief to those who, through their service, are no longer able to cope with the difficulties of life and carry on as they had done before they engaged in the conflict.

The Section of the Act read as follows:

Notwithstanding anything in this Act, on any application for pension the applicant shall be entitled to the benefit of the doubt, which shall mean that it shall not be necessary for him to adduce conclusive proof of his right to the pension applied for, but that the body adjudicating on the claim shall be entitled to draw and shall draw from all the circumstances of the case, the evidence adduced and medical opinions, all reasonable inferences in favour of the applicant.

History

Examination of the statements made to this 1930 Parliamentary Committee indicates that one of the main reasons for enactment of the benefit of the doubt clause was the difficulty encountered by the applicant in attempting to prove his case due to the absence of records. In this respect, Sir Arthur Currie, representing the Canadian Legion, appeared before the Committee,⁶⁴ and stated as follows:

I think it is impossible for a man to prove or get all the evidence that Pensions Board requires. His companions are scattered, he has forgotten the name of his Commanding Officer, and so on.

This circumstance was repeated many times by others who gave evidence before this Committee. Captain E.A. Baker,⁶⁵ representing the Sir Arthur Pearson Club of Blinded Soldiers and Sailors, stated as follows:

May I suggest, gentlemen, it is our hope and belief that every man who served in France beside us, and who is today partially or wholly disabled, but who for the lack of documental evidence or for other reasons, cannot establish his case, it seems to me that there should be no question as to the exercise of the benefit of the doubt...

Do you know when we speak of documentary evidence there was one item of equipment which was forgotten for the soldier in France, and that was a filing cabinet.

1932-33 Special Committee to Investigate the Pension Act *

The Report of this Committee contained the following reference: ⁶⁶

Comment of L.A. Audette, Chairman, John Thomson, Chairman of the 1932-
Board of Pension Commissioners, C.B. Topp, Chief Pensions Advocate
and Dr. Ross Millar, Director of Medical Services, Dept. of Pensions
and National Health.

* Committee appointed pursuant to Order in Council, P.C. 1741, August 4th, 1932.

History

Benefit of the Doubt (Section 73)

This section as enacted, must be taken to disclose the intention of Parliament. Courts do not make laws but interpret them. Primarily there must be a doubt before that clause can be applied. Reading some decisions of the Pension Appeal Court upon that section, it must be found that the Court went as far as possible under the circumstances, perhaps somewhat further than a civil court would have upon similar legislation. Indeed one must not confuse the question of burden of proof with the question of benefit of the doubt. From reading some of the memoranda supplied, it would seem that this criticism means that what the soldiers are seeking is that the moment a person has become an applicant (as defined by Section 2 of the Act) the onus would then be thrown upon the Crown to show he is not entitled to a pension - otherwise he would be.

This is a question of State policy and not of administration as coming within the scope of the submission.

It is submitted that while the changes above recommended may appear somewhat drastic, their adoption will in no wise interfere with the beneficial operation of the Pension Act in behalf of those whose interest it was designed to serve.

Comment of the Representatives of Veterans Associations on the Committee. *

The benefit of doubt clause was inserted in 1930 "because Parliament recognized the difficulty at this late date of establishing the continuity necessary to connect present conditions with service conditions."

Brigadier-General Alex Ross represented the Canadian Legion and was the spokesman for the veterans associations members on the Committee. In his report, Brigadier-General Ross quoted the President of the Pension Appeal Court, on the benefit of doubt clause as follows:⁶⁷

In my opinion, proof of evidence of the fact must be of the same general nature as is required in a Court of Law, as for instance, in a damage action for injuries or death. The method of proof might justifiably be more elastic,

* Brig. Gen. Alex. Ross, Canadian Legion;
 Frank G.J. McDonough, War Pensioners of Canada;
 Richard Myers, Amputations Association of the Great War;
 W.C.H. Wood, Army and Navy Veterans in Canada.

History

but the proof must be positive and not left to mere conjecture, suspicion, or surmise. It may happen that on a consideration of the whole case the evidence may preponderate as against the application, but while he would in that case, probably fail in a court of law, it was intended by Parliament that, notwithstanding the weight of evidence against him, the applicant should succeed but always provided a prima facie case, at least, is established or made in the first place, on the balance of the two which is a real and substantial, but not a fantastic, doubt in his favour is left in the mind of the Tribunal Court...

It is to be observed that the Legislation does not state that "all inferences" are to be drawn in favour of the applicant but only all "reasonable inferences"..."

The opening words of the Section cannot be disassociated from the latter portion. The statement that it shall not be necessary for him to adduce conclusive proof seems to have a controlling influence over the whole Section.... it must be assumed to have been intended that some proof was required. The writer's conception is that at least a reasonable prima facie case must be established by evidence of some convincing nature, though not necessarily so strictly regarded as in an ordinary Court of Law. If as a result then there is, reasonable doubt in the mind of the body adjudicating, this doubt can be resolved in favour of the applicant.

The veterans' representatives expressed doubt that the interpretations as quoted above "go as far as Parliament intended" and suggested that "the character of the man's service should be a factor". Their view was, however, that the fault lay in the construction of the Statute, and that the Pension Appeal Court should invoke the benefit of doubt clause in granting entitlement.

They recommended that Parliament should consider whether or not the benefit of the doubt clause adequately expressed the wish of Parliament and if not, it should be amended to ensure that the intent was stated "clear beyond doubt".

History

Comment of Col. L.P. Sherwood, Member of the Pension Appeal Court, concurred in by Brigadier-General H.F. MacDonald, Pension Tribunal:⁶⁸

Complaints made to the 1932-33 Special Committee by veterans organizations had alleged in general terms that the benefit of doubt was not being applied by the Commission or by the Appeal Court, and stated that the Appeal Court did not make reference to the Benefit of the doubt in its written decision. Colonel Sherwood stated, on this point:

That the Court considered as a matter of law Section 73 (Benefit of the Doubt) permeates the Act, and is regarded as the spirit of the Act, always present as a guiding principle and not necessarily to be particularly referred to.

The Pension Appeal Court operated from 1930 until 1939, during the whole of which time the benefit of the doubt was in the Statute. In fact the court and the clause came into being at the same time. At the opening of the Pension Appeal Court on February 2nd, 1930, the Chairman, Mr. Justice J.D. Hyndman, stated the views of the Court as follows:⁶⁹

I think every member of the Court appreciates that Parliament, by the legislation of 1930, intended that full justice must be done each and every applicant if proper proof is adduced that his claim falls within any of the classes or categories specified in the statute for which pensions are provided.

It is also clear that neither this, nor any other body, has authority, or jurisdiction, to award pension in respect of an applicant should the necessary qualifications for same under the law be lacking, no matter what his past record may have been or how deserving he otherwise may be, or how distressing his situation. Unless it is established satisfactorily that it falls within one of the classes which alone will entitle him to pension we cannot assist him.

History

Although this Court is one of the last resort in matters falling within its jurisdiction, nevertheless we must be guided by certain well settled fundamental rules of law, evidence and justice.

Whilst we may not be bound by any purely technical rules of evidence or procedure in the way or the extent perhaps that ordinary Courts of Law are bound, yet we must observe, as stated above, certain well-known and settled principles. What I should particularly refer to is the question of adequacy of proof of any material allegation, for example, that a certain disability, or death, was attributable to or was incurred during military service.

In my opinion, proof or evidence of that fact must be of the same general nature as is required in a Court of Law as, for instance, in a damage action, for injuries or death. The method of proof might justifiably be more elastic, but the proof must be positive and not left to mere conjecture or suspicion or surmise. It may happen that on a consideration of the whole case the evidence may preponderate as against the applicant, but whilst he would, in that case, probably fail in a Court of Law, it was intended by Parliament * that notwithstanding the weight of evidence is against him, the applicant should succeed, but always provided a *prima facie* case at least is established or made in the first place and on a balance of the two a real and substantial, but not a mere fantastical doubt, in his favour, is left on the minds of the Tribunal or Court.

In establishing the existence of disease or its origin, or cause of death where it is a matter of opinionative evidence, testimony of the same character should be given as is to be expected in a Court of Law, that is, it should be upon the testimony of duly qualified medical men, adduced under circumstances which insure reliability and credibility. The method of securing the testimony should be the best under all circumstances of the case and under the sanction of an oath wherever possible, and where the witness can be subject to cross examination, but in any event should be of such a nature that the Tribunal or Court is convinced of its honesty and reliability.

* See SC 1930, C.35, s.73

History

The opinion of a non-medical man on a medical question obviously cannot be considered as evidence. If an applicant has a good claim there should be no difficulty in adducing the opinion of properly qualified medical men. Failure to do so must strike the ordinary fair-minded man as being inexcusable.

In the case of the evidence of experts (in the legal sense not specialists as pointed out above) I think it must also be conceded that their testimony should be positive, and opinions founded on proven reasonable facts and circumstances, and not mere surmises, guesses, or base possibilities. By this I do not mean that it must be conclusive or overwhelming - but a reasonably clear, convincing case should be made out, or a reasonable doubt established, which brings the applicant's claim within the provision of the law.

The Pension Appeal Court handed down a number of decisions involving interpretation of the benefit of the doubt. Three are selected as important illustrations of the application of the section by that body:⁷⁰

(1) Service No. 24620 *

The reasons for decision of the Tribunal ** in this case, calls for some comment. They state that "it is extremely doubtful if death in this case is directly related to the man's military service, but as the doubt exists the Tribunal considers that under Section 73, the application must be granted."

This statement seems to indicate a misconception of this Section, which was added to the Pension Act by the Legislature of 1930. As has already been stated, it is the considered opinion of this Court that there must be evidence of facts before this Section can come into operation. In stating that it is extremely doubtful that death was related to service and resolving in this extreme doubt in the opinion of the applicant, the Tribunal appears to have stretched the meaning of this Section beyond its intendment.

Section 73 is directory. It says that "the body adjudicating upon a pension claim shall be entitled to and shall draw from all the circumstances of the case, the evidence adduced and medical opinions, all reasonable inferences in favour of the applicant".

* Names not used in this Report.

** Pension Tribunal (See page 63 hereof for terms of reference)

History

It is to be observed that the legislation does not state that all inferences are to be drawn in favour of the applicant, but only all reasonable inferences. Furthermore, the opening words of the Section cannot be disassociated from the latter portion. The section says that on any application for pension the applicant shall be entitled to the benefit of the doubt, which means that it shall not be necessary for him to adduce conclusive proof of his right to the pension applied for, but, that the inferences above mentioned shall be drawn. The statement that it shall not be necessary for him to adduce conclusive proof seems to have a controlling influence upon the whole Section. One would judge that the idea in the minds of the legislators was that theretofore, conclusive proof had been expected from an applicant for pension. The legislature definitely stated that conclusive proof was no longer required, but it must be assumed to have been intended that some proof was required. The writer's conception is that, at least a reasonable prima facie case must be established by evidence of some convincing nature, though not necessarily so strictly regarded as in an ordinary court of law.

If, as a result, there is reasonable doubt in the minds of the body adjudicating upon the claim, as to whether entitlement has been established or not, this doubt can be resolved in the favour of the applicant. As has been stated, the writer does not consider that a body adjudicating upon a claim and after consideration being extremely doubtful is entitled to resolve this extreme doubt in the applicant's favour.

(2) Service No. 42754 *

This Court has discussed on many occasions the meaning of, or interpretation which should be placed upon Section 73. There seems to be an impression in some quarters that the Section means that where it is not possible to show that the particular disability was not attributable to service, that therefore a reasonable doubt is established which the applicant must be given the benefit of. That is not my interpretation. The Section merely enacts that it shall not be necessary for the applicant to adduce "conclusive proof" of his right to pension, but that the body adjudicating on the claim shall be entitled to draw, and shall draw from all the circumstances of the case, the evidence adduced and medical opinions, all reasonable inferences in favour of the applicant.

History

It will be noted that the words "conclusive proof" are used. The only possible inference from the use of these words is that Parliament required that there should be some proof, not necessarily conclusive. Suspicion, conjecture and possibilities are not proof in any sense as regarded by all courts of law.

(3) Service No. 142339 *

As Colonel Sherwood ** has pointed out, the legal question of proof or evidence arises. On many occasions we have pointed out from the Bench and in written decisions, that the onus of establishing the right to pension is always upon the applicant. The Pension Act is the only authority under which pensions are granted, and those who seek pensions must comply with the terms, conditions and requirements of that Act. Section 11, in effect, indicates that pension shall be paid when the death or disability is the result of injury or disease or the aggravation thereof incurred on or attributable to service.

The responsibility for establishing a right to payment of pension is therefore upon the party applying which includes the duty of disclosing all facts within his knowledge having any bearing on the claim, and producing medical opinion which is founded on all obtainable facts, and where a situation such as the present arises, namely, that the ex-soldier suffered from a disease which may very well have been the cause of his death, that such disease must not be over-looked, but must be properly considered in connection with the proof of cause of death. The records in this case disclose this condition as being a possible underlying cause, and it was the duty of the applicant to bring forward reliable considered medical opinion that this was not or not likely to have been the cause.

It would appear to me, and I think it ought to appear to all reasonable men, that no doctor should give, nor be asked to give an off-hand opinion as to the effect of this particular disease in this case, especially in view of the great uncertainty which seemed to prevail in Dr. Edgar's mind as to the other supposed causes.

It was for this reason primarily that we remitted the claim so that the applicant would have another opportunity to establish, if she can, that the cause of death was not due to the specific disease, which if established, would bar her claim.....

* Names not used in this Report.

** Member of the Pension Appeal Court.

History

There may be an erroneous impression in the minds of many persons that Section 73, which is the reasonable doubt section, in effect dispenses with the necessity of proving the actual cause of disability or death, especially where the ex-soldier did suffer from some injury or disease whilst on service; that because it is impossible to find the exact cause, that therefore a doubt necessarily arises in favour of the assumption that service was the cause. As pointed out by Colonel Sherwood, the existence of injury or disease on service does not of itself raise a presumption that a post-war disease is consequent thereon. There must be proof of a satisfactory nature showing a connection between the two, and as has often been pointed out, proof of both the service conditions and post-war conditions must be drawn. The opinion of a medical man as to the origin of disease can only be of value when it is based upon properly established facts from which the doctor may draw his inferences or base his opinions. If any important fact or incident is left out of his consideration then it is obvious that his opinion is rendered practically valueless.

1941 Special Commission on the Pension Act and the War Veterans Allowance Act

Brigadier-General H.F. MacDonald, Chairman of the Canadian Pension Commission, filed a statement with the 1941 Special Committee on the Pension Act and the War Veterans Allowance Act concerning the administration of pensions and the "benefit of doubt" section in particular. This statement is quoted hereunder:⁷¹

Much difficulty has arisen in the administration of the Pension Act in determining the entitlement for disability, or death consequent upon disease. This is readily understood when one considers the wide range or field covered by the art of medicine and the difficulty which confronts even the most expert in determining the origin and cause of systemic disease. Indeed, in the absence of service medical records, in the majority of the neuro-psychiatric group, it has not been possible for medical men to give more than presumptive evidence of the existence or origin of disease during service in cases where the actual disability from such disease has arisen or become manifest many years post-discharge. A generous provision in this regard is Section 63 of the Act which reads:

History

63. Notwithstanding anything in this Act, on any application for pension the applicant shall be entitled to the benefit of doubt, which shall mean that it shall not be necessary for him to adduce conclusive proof of his right to the pension applied for, but the body adjudicating on the claim shall be entitled to draw and shall draw from all the circumstances of the case, the evidence adduced and medical opinions all responsible inferences in favour of the applicant.

1946 Special Committee on Veterans Affairs

A major discussion ensued on benefit of the doubt in the 1946 House of Commons Special Committee on Veterans Affairs. A proposal was made to introduce a clause in the Pension Act which would, in effect, have given an automatic presumption that an applicant's condition as recorded on his acceptance in the Forces was in fact his condition at that time, and any subsequent deterioration during service was due to service.

1946

Excerpts from the relevant discussions are given below:

At the Meeting on May 31, 1946, Major-General G.V. Pearkes, V.C., M.P., Nanaimo, B.C. moved the adoption of a sub-section to the benefit of the doubt clause of the Pension Act as follows: ⁷²

There shall be a presumption that an applicant's condition as recorded on his acceptance as a member of the Forces was in fact his condition at that time and that any subsequent deterioration during service was due to such service.

Brigadier J.L. Melville, M.C., the Chairman of the Pension Commission, told the Committee that no "presumptions" were required in our legislation. He stated:

If the condition was incurred on service, it is pensionable. Frankly, I do not see what there is to be gained. I beg your pardon. I had better not start to criticize. I may be getting off my beat. I will explain, all the same, how we apply this benefit of doubt clause; and may I say that the benefit of doubt is given in respect to

History

every application - and I mean every application - that comes before the Commission. In those cases where there is probably a little added benefit of doubt, they are held at the Board Room table each day. Then when the Commissioners get through with their regular work in the morning, dealing with the mass of cases then in hand, they study, deliberately and carefully, these cases where there is a question of doubt. By having a number of Commissioners, I assure you that the benefit of doubt is extended in favour of the applicant.

The Benefit of Doubt clause at that time, read as follows:

Section 62. Notwithstanding anything in this Act, on any application for pension, the applicant shall be entitled to benefit of doubt, which shall mean that it shall not be necessary for him to adduce conclusive proof of his right to the pension applied for, but the body adjudicating on the claim shall be entitled to draw and shall draw from all the circumstances of the case, the evidence adduced, and medical opinion, all reasonable inferences in favour of the applicant.

Brigadier Melville stated further:

May I point out that this Section does not direct that any or all doubt must be resolved in favour of the applicant. It states that an applicant shall not be required to adduce conclusive proof but that the adjudicating body shall draw from all circumstances of the case, etc., all reasonable inferences in favour of the applicant.

The only possible inference of the use of the words "conclusive proof" in a Section is that Parliament requires some proof, not necessarily conclusive. There must be some proof of an affirmative nature from which a reasonable man may infer that the disability or death was attributable to Military Service and that where there is evidence to the contrary, balancing one side off against the other, while the preponderance of evidence may be largely against the applicant, nevertheless, if a reasonable doubt exists, the applicant shall receive benefit of it. There must be first some positive or affirmative proof from which such doubt may properly arise. Suspicion, conjecture, and possibilities are not proof in any sense, and cannot form the basis for the application of this principle.

History

It is enough that there is no evidence to show just what the origin of the disease was, or that the origin was obscure, from which to infer reasonable doubt as contemplated by the Act. Nor is it intended to permit an adjudicating body to disregard definite evidence in the record. xxxxx

The Commission having duly weighed all the evidence, and balanced one possible cause against the other, draws all reasonable inferences in favour of the applicant. xxxxxx

There must be some proof of a substantial nature from which an inference can be reasonably drawn. I think it should be understood that in order to raise a reasonable doubt as contemplated by Section 62 of the Pension Act there must be some facts established from which such reasonable doubt can be inferred.

And that, gentlemen, is the policy of the Canadian Pension Commission and the application of Section 62 of the Act.

In supporting General Pearkes' motion, Mr. Howard Green, M.P. for Vancouver South, referred to the United Kingdom legislation, stating there were two clauses as follows: 73

Benefit of Doubt Clause

In no case shall there be an onus on any claimant to prove the fulfillment of the conditions set out in paragraph (1) of this article, and the benefit of any reasonable doubt shall be given to the claimant.

The Presumptions Clause:

Where an injury or disease which has led to a member's discharge or death during war service was not noted in a medical report made on that member on the commencement of his war service, a Certificate under Para.(1) of this Article shall be given unless the evidence shows that the conditions set out in that paragraph are not fulfilled.

History

Mr. Green suggested the inclusion of the "presumption clause" stating that this would be "far more in line with the wishes of the Canadian people".

Mr. L.A. Mutch, M.P. Winnipeg South Centre, spoke to the proposed amendment, stating that "it does not add anything to the powers of the Commission".... and that "it puts the benefit of doubt clause in language which is more understandable to the applicant".....but that "in my opinion the amendment is simply kidding the applicant". ⁷⁴

Mr. Walter Tucker, M.P., Rosthern, Sask., removed himself from the chair and spoke to the motion. He suggested that this "presumption" clause was a "rebuttal presumption" which meant that it would apply only where there was no other evidence, i.e., if the Commission had only the applicant's attestation documents and his discharge board, and it was found that he had been medically fit on enlistment but unfit on discharge, the presumption could be made that the disability was incurred on service. If, however, there was other evidence, the Commission would have to weigh it, and the "rebuttal presumption" could not be used solely as the basis on which pension could be approved. ⁷⁵

Mr. Tucker explained the relationship between the presumption clause and the benefit of doubt clause in these words:

If there was other evidence this would have to be taken into consideration. Then the Commission would have to consider the evidence which led to the presumption (i.e., physically fit on enlistment, unfit on discharge). If in doubt on weighing the other evidence against the presumption evidence, the Commission would presumably find in favour of the applicant because of the benefit of doubt clause. Mr. Tucker stated, that the benefit of doubt clause and presumption clause gave the impression that it could be easily understood in layman's language, but actually it does not mean that at all. That is the danger of it. It has a legal meaning which I have stated.

History

Mr. Tucker went on to say that the High Court of Great Britain had interpreted the words as meaning that the presumption is a rebuttable presumption and would not necessarily help the applicant.

Mr. Cecil Merritt, V.C., M.P., Vancouver - Burrard, B.C. suggested that the amendment would be helpful in that it would shift the onus of proof on the Commission to show that the man did have a pre-enlistment condition. He stated that a rebuttal presumption did not shift the onus of proof, but laid down a rule of law, and if there was evidence the onus of proof was still on the person who must make out the case.⁷⁶

A motion of Mr. Green added the words - "subject to the provisions of paragraph (c) of sub-section (1) of Section II of the Pension Act". The relevant provision of 11 (1) (c) is: "no deduction shall be made from the degree of actual disability of any member who has served in a theatre of actual war on account of any disability which existed prior to his service". The motion under discussion by the Committee now read:⁷⁷

62(a) There shall be a presumption that an applicant's condition as recorded on his acceptance as a member of the Forces was in fact his condition at that time and that any subsequent deterioration during service was due to service; subject to the provisions of para. (c) of sub-section (1) of Section 11 of the Pension Act.

Brigadier Melville stated that the proposed Section 62(a) would be contrary to the provisions of Section 11 in that it would give full pension for an aggravation to every one whether or not service had been rendered in a Theatre of Actual War.⁷⁸ This would place persons with no overseas service in a more favourable position than persons who had, for the reason that a person who served in a theatre of actual war was given full pension for aggravation only if the condition was not obvious or recorded on enlistment.

History

Brigadier Melville suggested, therefore, that the presumption clause should be workable only if it applied "in case of service in a theatre of actual war". If this were done, he told the Committee that they would be just repeating the provisions of Section 11(1) (c) of the Pension Act as it now stands.

Mr. Mutch proposed an amendment that the words "and presumptions" be added to the existing benefit of doubt clause.⁷⁹ The clause would then read:

Notwithstanding anything in this Act, on any application of pension, the applicant shall be entitled to the benefit of doubt, which shall mean that it shall not be necessary for him to adduce conclusive proof of his right to the pension applied for, but the body adjudicating on a claim shall be entitled to draw, and shall draw from all the circumstances of the case, the evidence adduced and medical opinions, all reasonable inferences and presumptions in favour of the applicant.

This amendment was adopted by the Committee.

Under date of June 11, 1946, the Committee approved the draft amendment to the Pension Act which included a new Section 62 as proposed by Mr. Mutch at the meeting of June 7, 1946, adding the words "and presumptions" to the benefit of the doubt clause.

McCann Commission

A Commission was appointed in 1948, under Part I of the Enquiries Act,⁸⁰ to investigate complaints made by Walter H. Kirchner, M.C., D.C.M., Secretary of the Canadian Combat Veterans Association, Vancouver, B.C., regarding pension and treatment rights for veterans.

This Commission, composed of Members of Parliament, was headed by the Honourable James J. McCann, M.P., Renfrew, Ontario.

History

The Commission's report commented upon six specific cases which had been cited by Mr. Kirchner with respect to pension consideration.

The report stated as follows:

The Commission realized that the relevant sections of the Pension Act are difficult to administer and it is aware that efforts have been made over the past years to formulate more specific language to convey the intent of Parliament.

It is emphasized that the six cases referred to are only a small percentage of those in which complaints were made by Mr. Kirchner. However, the Commission attaches importance to the fact that these six cases have not been dealt with to its entire satisfaction. The Commission holds the view that, even with an unchallenged record of pre-enlistment incident, due weight should be given to question of whether or not an appreciable disability existed at the time of enlistment in the Forces.

This Commission has noted the definitions of Section 62 of the Pension Act regarding "benefit of the doubt" which requires the Canadian Pension Commission to draw all reasonable inferences and presumptions in favour of the applicant.

This Commission is of the opinion that the Canadian Pension Commission has not in all of these six cases invoked to the fullest extent the "benefit of the doubt" clause in dealing with this particular type of case.

The Enquiry Commission is of the opinion that this legislation is intended to enable the Canadian Pension Commission to make a finding more favourable to the applicant in certain of the cases which it has examined.

1948 Special Committee on Veterans Affairs

An amendment to Section 62 of the Pension Act,⁸¹ dealing with benefit of the doubt, was approved at the 1948 Session of the House of Commons, after review by the Special Committee on Veterans Affairs. 1948

History

Dr. W.G. Blair, M.P., Lanark, Ontario, introduced the amendment before the Parliamentary Committee on Thursday, May 6, 1948. He stated "there has been considerable trouble about the benefit of the doubt clause and the difficulty that the Commission had in dealing with it". The proposed amendment eliminated the words "be entitled to" and "shall draw" from the Section. Dr. Blair explained the amendment, as follows:⁸²

If those words were struck out of Section 62 it would cause the Pension Commission a great deal less trouble and would make absolutely sure that the pensioner would have the benefit of the doubt.

Dr. Blair said further:

We have had trouble in persuading the Pension Commission to draw conclusions in favour of the veteran. I stated yesterday in discussing the other matter we found 10% of 60 cases where three medical members of the Board believed that they had not given the applicant the benefit of the doubt. I think if you re-word this section it puts the onus on the Commission that they make any presumption in favour of the applicant. I think this is the weakness of the Act.

Mr. Walter Harris, M.P., Grey-Bruce, stated:⁸³

My first impression would be that the striking out of the words would strengthen the purpose if I am reading the Statute and I find that I am entitled to do something I might have in mind the fact that I need not accept that; the use of the words "shall draw" is imperative.

Col. Alfred Brooks, M.P., Royal, N.B., suggested that Section 62 if properly interpreted, gave the benefit of the doubt. He stated:⁸⁴

It almost seems that there were some doctors or some people in the Department who were building up for themselves certain procedures by way of interpreting this section which took away from the soldier the benefit of the doubt to which he was entitled, and which I am sure, he could qualify under this Section.

History

What we are asked to do is amend the Act in order to give him, not more benefits so far as the benefit of the doubt is concerned, but to try to amend the Act so that these officials will interpret the Act as it is supposed to be interpreted.

I think that if the Act be interpreted as a layman or a legal man would read it, then the men have the benefit of the doubt and there is no question about it at all. To my mind, somebody must be looking for loop-holes if they pick out these words "entitled to benefit" as a loop-hole and build up a certain procedure around them. I think they are absolutely wrong. It is very hard for this Committee to pass legislation in order to correct what I believe an erroneous administration of this Act. I feel that if this Act is properly interpreted and administered, there is no question but that in every case the men will get the benefit of the doubt.

Col. Brooks asked whether the Pension Commission considered this change was going to assist in giving the applicant the benefit of the doubt. Brigadier Melville, the Chairman of the Commission, replied ⁸⁵ that the Commission is "very pleased indeed to accept the recommendation advanced by Dr. Blair, and in so doing let me state on behalf of my colleagues that we will note carefully the Minutes of the meeting and endeavour to comply with the intent as expressed by Dr. Blair and those who spoke in favour of that amendment".

In speaking further to the proposed amendment, Brigadier Melville stated that, under the former wording, it was a question of whether or not the Commission "gave it the benefit of the doubt". The new wording constituted what he termed a "mandate", and stated: "On the face of this, there may be no great material difference, even if there is a shade of difference, of benefit to the applicant for pension - and bearing in mind the observations that had been made by the various members of this Committee - then most certainly we will endeavour to apply it to carry out your expressed intent.

History

"Maybe to a lawyer that does not sound very good, Colonel Brooks, but I may sum it up and say it is honesty of purpose", ⁸⁶ Brigadier Melville concluded.

Mr. P.E. Wright, M.P., Melfort, Saskatchewan, stated that he was supporting the amendment because he considered that it was the desire of the Committee and also to "express to the Chairman of the Pension Commission the opinion of this Committee that, so far as the benefit of the doubt is concerned, we are not altogether satisfied that, in all cases, the benefit of the doubt has been given. We are trying to strengthen this section. Now the Commission must have obtained from the Committee the impression we want every case where there is a doubt to receive the full benefit of that doubt". ⁸⁷

Summary: 1948 Session of Parliament

The 1948 Session of Parliament amended the Act by eliminating the words "be entitled to" where Section 62 stated that "the body adjudicating on the claim shall be entitled to draw, and shall draw, from all the circumstances etc." thus revising the wording to read that the body adjudicating the claim "shall draw" from all the circumstances, etc. The revised Section, which was renumbered from 62 to 63, then read as follows: ⁸⁸

63. Notwithstanding anything in this Act, on any application for pension the applicant shall be entitled to the benefit of the doubt, which shall mean that it shall not be necessary for him to adduce conclusive proof of his right to the pension applied for, but the body adjudicating on the claim shall draw from all the circumstances of the case, the evidence adduced and medical opinions, all reasonable inferences and presumptions in favour of the applicant.

History

Amendment, 1952

When the Statutes of Canada were revised in 1952, this Section of the Act was amended by deletion of the words "shall be entitled to" and replaced by the words "is entitled to". Under the revised statutes, the benefit of the doubt section was re-numbered from 63 to 70 and read as follows: ⁸⁹

1952

70. Notwithstanding anything in this Act, on any application for pension the applicant is entitled to the benefit of the doubt, which means that it is not necessary for him to adduce conclusive proof of his right to the pension applied for, but the body adjudicating on the claim shall draw from all the circumstances of the case, the evidence adduced and medical opinions, all reasonable inferences and presumptions in favour of the applicant.

Special Committee on Estimates, 1955

Mr. Angus MacLean, M.P., Queens, P.E.I., cited a case where a man serving in the Army had died of cancer, and it had been ruled there was no connection between this condition and his service. He asked: ⁹⁰

1955

If the veteran is supposed to receive the benefit of the doubt, how can it be established that there was no connection?

Brigadier Melville replied that the responsibility of the Commission was "a very serious one". He stated that a very eminent jurist had said:⁹¹

Before you can extend the benefit of any doubt the doubt must have been created... There are no better or more experienced of the medical profession than those who are connected with the Department, and we refer to these specialists. We take advantage of that opportunity. Cancer is a killer... It is very difficult to say what caused that cancer, or whether it is directly concerned with a man's service in peacetime.

Mr. MacLean:

My contention is that you do not have to prove that. It would seem to me that the onus rests upon the Commission to prove that it was not the result of war service.

History

I am under the impression that there is very little known about what causes cancer.....It would seem to me that.... it could not be said there was no connection between a man's service and the cause of his death.

Brigadier Melville:

One must be guided by the medical opinion. A member of the peacetime forces, serving in Canada, is probably occupied in a way which would differ very little from the normal civilian.... Unless you could find some instance which would lead you to believe that the disease could arise from, or was directly connected with, a man's service, we could not concede entitlement. There have been cases of cancer where we have found a connecting link, but there are a number of others where we cannot find any evidence whatsoever, or any doubt.

Dr. Blair cited the case of a veteran who had received pension for the loss of an arm at the shoulder from shrapnel injuries and who subsequently made application for pension for a fractured vertebrae. He said that the Commission would not agree that the impact of shrapnel which had caused the loss of the arm was sufficient to fracture the spine. He stated before the Committee: ⁹²

I am very interested in that clause, I was connected with it, and I moved it when it first came before the Veterans' Committee, and at times I have been confused by some of the interpretations which have been placed upon it.....where does the benefit of the doubt come in? I admit I am confused. I do think that with such a history of severe injury, allowance should have been made.

Brigadier Melville:

I have known that particular case.....Personal appearance in Kingston....local members of the medical profession could not find any service relationship.

This raises a very serious problem and one which is constantly arising. Many members of the forces consider that because they claim for a pension and make statements in support of that claim, that by doing so they create a doubt, and that we should award pension.

History

Col. Brooks asked for the number of cases in which the benefit of the doubt arises. Brigadier Melville replied that there were between eighty to one hundred applications for entitlement each day. "Of that number I would say that twenty-five per cent are granted with the benefit of the doubt. And if doubt is created in our minds, we take advantage of the provisions of Section 70 of the Act, and concede accordingly". 93

Mr. C.A. Cannon, M.P., Isles de la Madeleine, suggested some confusion existed between the benefit of the doubt and the displacement of the burden of proof. He said: 94

The applicant has to establish that he is entitled to a pension. Some people seem to think that because an applicant makes a request and because he brings forward certain facts to support it, that that displaces the burden of proof and that it is up to the Commission to prove that he is not entitled to a pension. But the real fact is that it is always the responsibility of the applicant for a pension to establish facts which could at least give rise to a doubt, and if he is not able to establish those facts he is not entitled to the pension. But if he is able to establish a doubt, then he is entitled to the benefit of the doubt. However, it is still up to him to establish facts which give rise to this doubt in the minds of those who have to deal with the case. That does not mean that the burden of proof is displaced.

Mr. W.A. Tucker, M.P., Rosthern, Sask., the Committee Chairman, stated: 95

"Benefit of the doubt" is a legal phrase put by judges to juries all the time. They say these must be more than a remote possibility... there must be a doubt such as you would act upon in the ordinary affairs of your life. Almost anything is remotely possible but it cannot be a fantastic possibility. It must be something reasonably possible. In applying that particular rule it is a matter of the Commission exercising its judgment as to whether there is real doubt there, a real possibility, or whether there is a very remote one.

History

In cases such as the one cited by Mr. Blair, the Commission is dealing with one of the most difficult problems which the Courts have to deal with. He mentioned the alternative of using Courts and said: "This would lead to great rigidity and they would be tied down by precedents. It was felt that it was better to leave these questions to be determined by a Commission in which Parliament and veterans organizations had confidence; that it would interpret the Act in a sympathetic way, and that its decisions would not be subject to appeals outside their own body. In cases like this there is bound to be a difference of opinion.

The Honourable Hugues Lapointe, Minister of Veterans Affairs, stated: ⁹⁶

For many people the benefit of doubt is interpreted as meaning the onus of bringing evidence is now on the Commission, and that the Commission has to prove that that was not the cause of the injury. This is not correct. If you want to give the benefit of the doubt to an applicant, it is still up to the applicant to establish before the Commission such evidence as will create a doubt in the minds of those who will sit upon the Board. It does not require the Commission to bring forward evidence to prove that the applicant is wrong.

Mr. Colin Cameron, M.P., Nanaimo, B.C., stated: ⁹⁷

The onus is upon the applicant to produce the facts which would be calculated to create a doubt at least in the minds of the Board.

Referring to Dr. Blair's case:

It would seem to me that unless the Board had conclusive medical evidence, that such a thing was impossible, then it was certainly a case for the benefit of the doubt, and that merely contrary opinion as to the possibility of it was not enough to relieve the Commission of its duty to invoke that clause.

Mr. Tucker spoke of the degree of possibility:

If such possibility was only "one out of a thousand" such would not be the case which could be regarded as reasonable doubt.

In other words, what the Commission is trying to imply here is what juries have to apply all the time, when they are told by the Judge that the Crown must prove its case beyond a reasonable doubt.

History

That doubt is not anything that may be conjectured up as a remote possibility. It must be a doubt which would occur in the ordinary affairs of life, and the Commission must apply it in these cases in favour of the applicant.

We have decided over and over again that it should be that way. I think the veterans organizations and everyone else felt that if it was left in an elastic condition rather than subject to rigid legal interpretation, it would be much better, and I think it has worked out better for the veteran himself, that way, than if it had been otherwise. The difficulty is to decide whether a doubt is a remote possibility or something under which they should act under this Section.

As everybody knows, this is something which hangs up a jury for two or three days in trying to arrive at a decision, and sometimes it leads to disagreement of jury and the necessity of a re-trial.⁹⁸

Mr. Cannon asked if Brigadier Melville agreed that:

The Section of the Pension Act applies to the same reasonable doubt with which a jury has to deal in court cases? As a lawyer, I know that a reasonable doubt is one which would move a reasonable man, in the ordinary affairs of life. It has to be quite a substantial doubt. I wonder if the doubt which is required in this case, has to be as substantial as the doubt which is referred to in courts of law.⁹⁹

Brigadier Melville replied as follows:

The great bulk of our decisions are based on medicine, and medicine is not an exact science. Our Act provides for the benefit of the doubt, and we extend it. We have lay Commissioners who may not agree with the lawyers on one side or with medical opinion on the other. All factors must be considered. If the doubt is created when we discuss these cases in the Board Room, that doubt is resolved when we say "alright, that is the end".

Mr. Cannon: In other words, in applying the benefit of the doubt, the Commission gives to it a broader and more generous interpretation than the Law Courts would?¹⁰⁰

Brigadier Melville: I can assure that it is absolutely so.

History

Mr. Gordon Churchill, M.P., Winnipeg South Centre, spoke to the subject as follows:

I am far from convinced that the benefit of the doubt is applied on occasions when it should be. It was written into the Act because of the difficulty involved in adducing conclusive evidence. It was intended to permit the Pension Commission to make a presumption in favour of the applicant. I hope some of the statements which are made here this morning will not be construed as advice to the Commission because I thought that the statement of the Minister, for example, gave a different meaning to this Act, and wasn't intended as he read it. I am very happy that it has been read in the record. I think that the benefit of doubt clause needs to be considered pretty seriously by the Pension Commission. The Pensions Advocate tells me, and Brigadier Melville has told me on many occasions - that it is invoked very, very frequently, but I still have some reservations in regard to it, and perhaps our discussion this morning will have some influence on the Commission in the application of this particular Section.

I take it that it was introduced primarily because of the difficulty in establishing cases affecting men serving in the First World War. We all know that the documents were not kept in the same shape in the First World War as they were in the Second World War. We were not subject to X-ray examination, and the First World War people have so little to rely on. But nowadays, the practice has become such that you have to have everything written down on your documents, and I think there must be more sick parties and hospitalizations in the modern Army than there were in the past, because the fellows in the First World War had to have something written down on his document, and if it was not written down on his document, then his chances were somewhat limited for the future. ¹⁰¹

Brigadier Melville stated:

I have ordered extra copies of the proceedings of this Committee. Do not think I hesitate for one moment to bring your observations before my colleagues. I do that after a debate in the House or after a special Committee on Veterans Affairs has met. I "go to town" strongly and what has been said here this morning with regard to the benefit of the doubt and the other matters raised will certainly be brought to their attention.

History

Standing Committee on Veterans Affairs, 1959-1960

Discussion concerning the benefit of the doubt arose out of briefs from veterans organizations and consideration of departmental estimates.

1959-60

The main points are summarized hereunder: ¹⁰²

Mr. W.G. Beech, M.P., York South, Ontario stated that there had been a "lot of argument and dissatisfaction" about the benefit of the doubt and would like to hear some comments.

Mr. L.A. Mutch, now the Deputy Chairman of the Pension Commission, stated that he did not "ever expect to be able to satisfy everyone with respect to benefit of the doubt". Then he went on to give this explanation:

The Benefit of the Doubt which is described in Section 70 is a doubt in the mind of the Judge, if I may use that expression or of the man who is hearing the case. In effect the Section says that if the three men who constitute the Appeal Board hearing a case have reasonable doubt - and it says: "reasonable doubt" - in their minds as to the decisions which shall take, then they shall draw reasonable inferences in favour of the applicant. The Act says reasonable inferences and again the decision as to what is reasonable or unreasonable must exist in the minds of the men who are hearing the case. The result is that when an application is granted, as a great number are granted as a result of Section 70, the person who succeeds is satisfied. But the person who does not succeed is likely to suggest that we have not exercised that discretion in his favour. The power to give, in a Section like that, is balanced by the power to deny. The Commissioners contended through the years - and I think it has been accepted - that the decision lies only in the minds of the Judges themselves, as their responsibility.

One cannot say that the Appeal Board should have a doubt about this simply because I have a doubt. On the whole it works to the advantage of the veteran population generally, and I would venture to suggest to you that more than 80 percent of the entitlement awards which have been granted in respect to World War I, in the last five years while I have been with the Commission, could not have been granted without resort to the benefit of Section 70. I do not think anyone would challenge that.

History

On further questioning Mr. Mutch said:

There is only one person who can decide whether the evidence produces any doubt or not - and that person is the Judge.

Mr. Beech asked if there were any rules governing the interpretation.

Mr. Mutch replied:

The very minute you impose on discretion, you limit that discretion. Four times(it was) attempted to put something in the Act under Section 70 which would broaden it... The present Minister (The Honourable Mr. Brooks) was not of the opinion that it could be broadened by definition, the minute you say it is not, or the minute you say it is, you limit the opposite.

With respect, I suggest to you that a lot of people have tried to improve it. This is your prerogative. But I suggest to you that it works extremely well and I suggest further that there will always be dissatisfaction until everybody who applies gets an award, and in which event there would be pension for service.

House of Commons Debates, December 12, 1960 to February 9, 1961

The Honourable Gordon Churchill, Minister of Veterans Affairs, introduced an amendment to the Pension Act on December 12th, 1960. This amendment provided for an increase in the basic rate and various minor administrative changes. Some 42 Members spoke during the first, second and third readings of this Bill. A great deal of criticism was stated concerning the restrictive interpretation of the benefit of doubt clause. Excerpts from the comments of some Members follow:

Mr. Gage Montgomery, M.P., Victoria-Carleton, N.B.¹⁰³

We should be careful about passing judgement on this exercise of discretion by the Pension Commission until we have heard both sides of the case....I think anyone learned in the law will understand.....that the discretion left with a body or with an individual is exercisable by that body or individual. If the Commission is not exercising its discretion to the satisfaction of those who appear before the Committee there is not much Parliament can do about it. We cannot

1960-61

History

appoint a man to a position and then tell him what to do.... I have studied this Section and I do not see how Parliament can do much more.

Mr. G. Roberge, M.P., Megantic, Que. ¹⁰⁴

I understood there was some possibility that an amendment could be made to Section 70 of the Act.... there are some cases where we, who had to deal with similar cases, feel that they (CPC) do not exercise discretion as they should.

The member for Victoria-Carleton (Mr. Montgomery) said that in his opinion it was impossible to improve an Act and the Minister of Veterans Affairs should...undertake a special study of Section 70.....and try at least to find a new formula or re-write the law so that veterans can be given full justice.

Our criminal code, relying on the theory of Benefit of the Doubt states that the accused is considered innocent until proven guilty. I believe the same should apply in the case of the benefits to be paid to veterans as well as to those who devote their energy and their health to service of our country, both in time of peace and war.

E.J. Broome, M.P., Vancouver, B.C.

An amendment should be introduced to this Section (Section 70) and according to the statement of the Minister something is going to be done in this respect. Speaking in this House on December 12, 1960, the Minister said: ¹⁰⁵

In some instances the Act and the interpretation of the Act have limited the activities of the Pension Commission, and in the revision that is now going on it is our hope that some of the Sections that have hindered the Commission from time to time may be altered so that its work may become more effective.

Each of us will have to place his own interpretation on the words contained in that paragraph. We will not know what will be accomplished until the Bill comes before us.

C.R. Granger, M.P., Grand-Falls - White Bay, Labrador. ¹⁰⁶

In marginal cases when decisions are being made as to whether the veteran deserves to receive benefits, the benefit of the doubt seldom is given to the veteran.... the very spirit of the administration of veterans affairs should be to give the benefit of the doubt to the veteran. Imponderables which it is impossible to pin down as fact

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are often associated with veterans requests. In such circumstances rather than risk an unjust decision....it is the fair thing and the wise thing to let mercy season injustice.

Mr. W.G. Beech, M.P., York South 107

There is, however, one matter that continues to give veterans organizations considerable concern and that is the continued practice on the part of the members of the Pension Commission of placing their own interpretation on Section 70. This concern has been expressed by various veterans organizations. It was expressed by the Canadian Legion in a Resolution in the following words:

That the Government take action to ensure that the Benefit of the Doubt as set forth in Section 70 of the Pension Act is in fact extended to all applicants under the Act.

Mr. Beech referred to an appeal board decision as follows:

The Board, after carefully reviewing the entire evidence, concludes that although the possibility exists that the pensionable condition may have influenced the disease processes leading to the death, the probability of such has not been sufficiently established to bring this case within the provisions of Section 70.

Mr. Beech commented:

Here is a case where the Board felt there was a doubt but it was not sufficient to bring it within Section 70.

The intention of Parliament as set out in Section 70 is clear enough; the difficulties would be in interpretation and it seems to me that members of the Commission believe that the doubt mentioned means the doubt in their own minds; whereas Parliament meant doubt as to the completeness of the evidence produced on behalf of the veteran.

G.C. ... M.P., ... 108

The Pension Commission relies to a great extent on the Medical Advisers and that, notwithstanding the weight of evidence in favour of the applicant, the benefits of this Section cannot be resolved until a doubt has been created in the minds of the Commissioners. I do not think there is much we can do to amend the Act. After all, you can make an Act and you can make Regulations and they are just as good as is the Administration.....I think the

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position which the Pension Commission are placed by this Section 70 is an extremely difficult one. The question arises whether or not they give the applicant the benefit of the doubt. It is debatable.

C.A. O'Leary, M.P., Antigonish-Guysborough 109

From the approximately 20 members who have already spoken on this Resolution, I have noted that the majority have expressed some dissatisfaction with the Pension Commission's application of Section 70....I too very strongly feel that the Commission is not carrying out the intent of Parliament. The purpose or intent of Section 70, as set out by Parliament, permits, if not instructs, that body to give the veteran the benefit of the doubt when further or more conclusive medical evidence is desirable for an award... the Board has taken the view that sufficient and conclusive evidence should be presented to the degree that there can be no element of doubt in their minds that an award is justified.... I sincerely hope that in the future the original and actual intent of Parliament will be more carefully observed.

E.A. Winkler, M.P., Grey-Bruce 110

I hope that some consideration will be given in the Legislation to the interpretation of the benefit of the doubt clause. I believe this matter was made very clear back in 1945.... The benefit of the doubt clause was included for the clarification of particular cases in the minds of the Pension Commissioners.

Mr. Winkler made reference to the remarks of Mr. Walter Tucker, Parliamentary Assistant to the Minister of Veterans Affairs, in the House of Commons on August 1st, 1946 who stated:

If there was any doubt whether this disability was incurred during service or was due to service, or the aggravation was incurred during service or was due to service, the applicant was to get the benefit of the doubt. I really do not see how it could have been made much plainer.

Mr. Winkler said:

This indicates very clearly how the benefit of the doubt clause is to be interpreted...it may be time now to discuss again with the members of the Pension Commission their interpretation of the Legislation.

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Mr. C.A. Best, M.P., Halton, Ont. 111

I think the benefit of the doubt should not be interpreted in favour of the Commission but must be given to the veteran.

In a field such as medicine this sort of doubt is only natural and that such doubt should occur in a large number of cases is only natural. If we are putting the elimination of doubt on this basis of medical certainty, then it is only normal that a large number of cases will be turned down. However, if the veteran were given the benefit of the doubt I think we would reach a more equitable solution.

G.W. Paldwin, M.P., Peace River 112

Something has been said about the principle of the benefit of the doubt. It would seem to me that this is a term which has a definite and specific connotation in the minds of courts and lawyers. In any case where there is a dispute between the Crown and a subject or citizen, when all the evidence has been introduced and is before a tribunal, if it is difficult for the tribunal to formulate a firm decision then the benefit of the doubt must be given to the citizen as against the Crown. That is something which has come down to us through generations and centuries of our legal experience in common law. I would think that the intention of those who drafted this particular section must have been guided to this particular phrase and its meaning.

R.D.C. Steward, M.P., Charlotte, N. B.

A great deal has been said about the benefit of the doubt clause. As honourable members have pointed out, this is quite a familiar phrase to those of us who are lawyers, but no Judge has been able to define precisely or satisfactorily "what is a reasonable doubt". We interpret it as meaning that if, after all, the evidence has been heard, there is any doubt on the whole case, or any phase of it, that doubt must be resolved in favour of the accused person. I think the same interpretation should apply to applications for a pension before the Pension Commission. 113

The Hon. Mr. Gordon Churchill, M.P., Minister of Veterans Affairs

Most members spoke.....on the application of the benefit of the doubt.....they did this not in criticism of the Pension Commission which is held in high regard by members of Parliament..... I do not think anyone is critical in a serious way of the Pension Commission. On the other hand, the members, as I assess what they have been saying during the past two days, think that the Pension Commission perhaps has not interpreted the benefit of the doubt clause in the way in which people have expected it

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to be interpreted... this is an old and continuing problem, and I hope that we can look at it again this year in the Standing Committee of Veterans Affairs and in consultation with the Pension Commission. 114

The Commission is an independent body they may not accept our advice, but, on the other hand, I think it would not hurt for them to be aware of the understanding that Members of Parliament have with regard to this particular clause (Section 70) of the Pension Act.

The Benefit of the Doubt clause was incorporated into the Act to make provision for men who could not provide documentary evidence as to the hazards they underwent when they were overseas.

Mr. Churchill then referred to the various amendments to the Act and continued:

My judgement is that no matter how frequently we amend the clause the question will still be determined on the basis of interpretation..... from the number of members who have spoken about the benefit of the doubt clause and from the interest that has been shown in the application of that clause the Pension Commissioners may reasonably reach the conclusion that Parliament is seriously interested in - what shall I say - a generous application of the benefit of doubt clause..... we are not asking them to lower the barriers and let anybody in..... in these bona fide cases where men have actually served and have suffered from their service I think it is the opinion of Parliament that the benefit of the doubt clause should apply.

Standing Committee on Veterans Affairs - 1960-61-62

The Legion brief proposed that the Act be amended to prohibit a Commissioner from sitting on an Appeal Board in any case in which he has either dictated, signed or otherwise dealt with in an earlier decision, and that the Commission be forced to place on the file of the applicant the names of all the Commissioners dealing with the case, including any Commissioner dictating a decision.

1961-62

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In regard to this proposal some discussion developed regarding benefit of doubt and the statement in the Legion brief that "nearly 50% of the cases heard at Appeal in the fiscal year 58/59 were successful".

The inference taken was that the original hearing and second and renewal hearings must have been open to criticism if half the decisions were wrong. In this regard Mr. T.D. Anderson, Chairman, Canadian Pension Commission stated: 115

Well, I would dispute that statement. Personally I feel it is a good thing if, ultimately, the individual receives a pension. It indicates that up until that time he has not been able to establish his claim, and it may well be that realizing that he ultimately may have to go to Appeal if he wants to keep a little bit of ammunition back for the Appeal and, therefore, does not give us all the information at the hearing stage. It could indicate that. It also could indicate that for other reasons perhaps, he has not been able to present all the information. But, when it comes to Appeal - and this is the significant thing about Appeals - he knows he is at the end of the road, and realizes that he must provide the Commission with every bit of evidence he can find to support his claim. I think that is the basic reason why a high percentage are granted. Also, added to that is the fact that he appears before the members who are sitting on the Board and they say: "This is a nice straightforward type of individual; he has been a good soldier and we are convinced he is right". All these things add up to increase the number of pensions that are granted at the Appeal Board level. As I say, I think it is a good thing and not a bad thing.

Mr. D.H. Thompson, the Dominion Secretary, Royal Canadian Legion, stated that his organization had tried for years to change the Pension Commission policy and attitude and had now reached the point where they had exhausted any means at its disposal. He continued:

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We now come to the point where it seems to us there is a need for some legislative change, but we do not see how you can spell this out any more clearly than Section 70 already does. We do feel, however, that there is a need for something, and if we can not convince them of the need for a change in policy then there must be a change in legislature although we cannot suggest what form it should take. I think that forty Members in the House have referred to the benefit of the doubt and the Minister made certain reference as to it.

Mr. Thompson stated that the Legion felt that perhaps the Commission would change its interpretation of policy but that this did not appear to have worked out.

Standing Committee on Veterans Affairs, 1963

The main item of business before this Committee was a review of Bill C-7: An Act to Amend the Pension Act, (Judicial Appeal). This Bill* was submitted to the House as a "private members" bill by Mr. Jack McIntosh, M.P., Swift Current, who, in referring to the benefit of the doubt, stated that this clause was being misinterpreted by the Commission. He told the House: 116

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The Pension Commission is a tribunal so powerful that its members are a law unto themselves. The members of the "tribunal" are not concerned with the thoughts or interests of the members who drew up the Act and have not reviewed the Committee Minutes of the Hansard when the Act was amended. The intended broadness of the interpretation was expressed on those occasions by many speakers, including the Minister in charge of the Department.

Mr. McIntosh stated that the Pension Commission pays no attention to other Statutes which would have a bearing, e.g. Section 15 of the Interpretation Act which states, in effect, that every Act shall receive such fair, large and liberal construction in interpretation as will best ensure the attainment of the object of the Act.

* Introduced in the House of Commons on March 13, 1962 as Bill C-21.

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The interpretation of Section 70, as given to Mr. McIntosh by a private lawyer, was that the "benefit of the doubt" would be doubt that might exist in the mind of a reasonable man. A judge interprets the law to the best of his ability as a man learned in the law. He looks at the facts and weighs them, tests them, and doubts them and he, the judge, imagines what a reasonable man sitting in a jury would do. In other words he applies the law as a learned man and considers the facts as a reasonable man. 117

Mr. McIntosh then suggested that the interpretation by the Commission is "directly opposite to the interpretation of the courts and opposite to the intent of the court and the intent of Parliament".

Mr. McIntosh referred to civil actions and stated that the applicant only has to produce a preponderance of evidence, and in legal phraseology I understand that preponderance means just slightly over 50% and stated that such would 'tip the scales' in favour of the applicant.

Mr. T.D. Anderson, Chairman, Canadian Pension Commission stated: 118

A very high percentage of claims are granted through the use of Section 70. It may not be in the best interest of veterans generally to attempt to define precisely just what certain sections of the Act mean. This would limit the discretion of the Commission. The Act is deliberately drafted in a loose way to ensure every possible consideration for the applicant.

Mr. P.G. Mutter, Pension Counsel for the Pension Commission, told the Parliamentary Committee that some persons jump to the conclusion that the benefit of doubt in the Pension Act is a reference to the doctrine

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of benefit of doubt applied in criminal matters within the realm of British justice, i.e., that the Crown must prove "beyond a reasonable doubt" that the accused is guilty. Mr. Nutter stated: ¹¹⁹

Surely it is not the intention of Section 70 of the Pension Act to apply this same thinking to applications for pension benefits.

His interpretation was as follows:

Firstly, evidence must be adduced by/or on behalf of the applicant, sufficient to show some basis for claim. In this he is aided by Pension Commission and departmental staff as well as by Service Bureaus of veterans organizations or by private legal counsel, dependent upon the applicant's wishes. The onus then shifts to the Medical and Claim Branches of the Pension Commission to adduce such evidence as may seem fit and proper, for the protection of the Canadian tax-payer. The applicant has ample opportunity to reply to, or to refute, any evidence that might be tendered on behalf of the Crown. The Commission must then weigh the preponderance of evidence. If there is any reasonable doubt in the minds of the Commissioners hearing the case, same must be resolved in favour of the applicant. The Pension Act clearly states that the 'doubt' referred to must actually exist in the mind of the individual Commission member and I quote: "the body adjudicating on the claim shall draw.... all reasonable inferences and presumptions in favour of the applicant".

Legion Brief ¹²⁰

The Legion brief of 1963 stated that the interpretation of Section 70 appeared to be "the crux perhaps of more than 90% of the problems arising in the adjudication of claims". ¹²¹ The Legion considered that the applicant was not called upon to prove his case absolutely but that the Commission must draw upon the circumstances, the evidence and medical opinions "all reasonable inferences and presumptions" in favour of the applicant.

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The brief expressed the view that, if the Commission were giving the correct interpretation to Section 70, there would be no need for the establishment of a judicial appeal as envisaged in Bill C-7.

The Legion brief quoted Mr. T. D. Anderson, Commission Chairman, to the effect that after taking office, he looked into the application of Section 70, and instructed the Commissioners that, in future, when they invoked Section 70 this should be included in the written decision.

The Legion brief commented as follows: ¹²²

Proper Use of the Benefit of Doubt Clause: The Commission interpreted this to mean that the veteran must create the doubt. The latter portion of the clause (Section 70) places upon the Commission a responsibility of drawing all reasonable inferences and presumptions in favour of the applicant and removes from him the necessity of conclusive proof of his right to pension.

COMMITTEE RECOMMENDATIONS

(25) That Section 70 of the Act be amended to incorporate the following principles in respect of applications for entitlement and on all other matters under the Pension Act including assessments, degree of aggravation and retroactivation, and on appeals therefrom:

Benefit
of Doubt

1. Onus:

When the applicant has made an application supported by evidence which, if uncontradicted, should entitle him to succeed, he shall have discharged his onus.

Applicant's
Onus is
to Make
Application

2. Inferences:

In considering the application initially, and in all subsequent stages of the proceedings, the body or person adjudicating on the application shall draw from all circumstances of the case, the evidence adduced and medical opinions, all reasonable inferences in favour of the applicant. References to presumptions should be deleted in this context.

Inferences
to be Drawn
in Applicant's
Favour.

3. Preponderance:

When the evidence has been considered and all reasonable inferences drawn in his favour, the applicant shall be entitled to the benefit of the doubt in that his claim may be allowed, even though the preponderance of evidence is against him.

Claim May be
Allowed Even
Though
Preponderance
is Against
Applicant

(26) That the Act be amended to provide a new Section, such to declare the intent and purpose of the Act to be to provide compensation in fulfillment of the obligation of Canada to make reparation for loss sustained through disability or death in the performance of the highest form of service to the State; and that in keeping with this intent and purpose all provisions of this legislation to be administered or interpreted in such manner as to provide every reasonable consideration and benefit for those disabled or bereaved by military service.

Intent and
Purpose

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It would appear that one of the significant reasons for the adoption of the benefit of the doubt was to ensure proper consideration in cases where documentary evidence was limited or was not available. From subsequent discussions in Parliamentary Committees and in Parliament, it seems clear that regardless of the initial intent this rule is now considered by many to govern the entire administration of the Act. Your Committee would refer particularly to the views as expressed by Members of Parliament in 1946, 1948, 1955 and 1960-61.*

The benefit of the doubt clause has remained a subject of uncertainty since its inception in the Act in 1930. Despite attempts to clarify this clause in amendments to the legislation in 1946, 1948 and in 1952, there is still considerable controversy concerning its interpretation.

Various definitions noted by your Committee are given below:

- (1) The onus to prove his claim lies with the veteran, but where he cannot produce conclusive evidence, the Commission shall give him the benefit of the doubt where such can be adduced from the circumstances from evidence and medical opinions.
- (2) The benefit of the doubt means "reasonable doubt" as applied in criminal law; hence, the Commission must find in favour of the applicant unless it can determine beyond all reasonable doubt, that pension should not be granted. Controversy exists as to whether the "reasonable doubt" should be that in the minds of the Pension Commission or, alternatively, that in the mind of a "reasonable man" as normally applied in criminal law.

* See pages 290 to 314 hereof.

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- (3) Pension applications should be decided on a preponderance of evidence as in civil law, and where, in considering the case, the adjudicating body concludes that there is preponderance and, in effect, the evidence before and against is evenly balanced, the benefit of the doubt clause shall tip the scales in favour of the veteran.

These appear to be the three most common interpretations. Your Committee noted others, and there is ample evidence to indicate that the clause requires clarification.

Benefit of the Doubt - Other Countries

It is probably as well, at this juncture, to review the terms of pension legislation in the United Kingdom and the United States, inasmuch as these terms have referred to by some of those making representations to your Committee.

United Kingdom: Pension legislation in the United Kingdom for death or disability arising out of war service contains two provisions dealing with benefit of the doubt, as follows:¹²³

- 4(2) In no case shall there be an onus on any claimant under this article to prove the fulfillment of the conditions as set out in paragraph (1) of this article and the benefit of any reasonable doubt shall be given to the claimant.

- 4A(3) Where, upon reliable evidence, a reasonable doubt exists whether the conditions set out in paragraph 1 of this article are fulfilled, benefit of that reasonable doubt shall be given to the claimant.

The first section refers to entitlement where disablement is claimed or death takes place not later than seven years after the end of war service. The second refers to cases where a disablement is claimed or death takes place more than seven years after the end of war service.

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United States: There is no "benefit of the doubt" clause as such in pension legislation for the ex-members of the United States Armed Forces. There is, however, what is known as a "presumption of a sound condition".*

Interpretation by Commission

The Pension Commission has had the responsibility to interpret the meaning of the benefit of the doubt clause. The Commission, acting as a whole, has not decided upon an interpretation of the section. Brigadier J.L. Melville, in his capacity as Commission Chairman, gave an interpretation,** as did Mr. L.A. Mutch, in his capacity as Deputy Chairman.*** Mr. T.D. Anderson, the present Chairman, explained his interpretation to your Committee.**** He stated that it would not be possible for the Commission to promulgate an interpretation of Section 70, but that the Commissioners were free to use their own interpretation, and that a measure of agreement as to the meaning of the Section was arrived at by association and discussion among themselves.

Brigadier Melville's interpretation was that, where there was reasonable proof supporting the claim and there was a preponderance of evident to the contrary, the claim could be approved if a reasonable doubt existed. Mr. Mutch's interpretation was that, if the adjudicating body has "reasonable doubt", they shall draw reasonable inferences in favour of the applicant; and the decision as to what is reasonable or unreasonable must exist in the minds of the men who are hearing the case. Mr. Anderson's interpretation was that Section 70

* See page 220 hereof

** See page 290 hereof

*** See page 306 hereof

**** See page 256 hereof

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directs the Commission to draw all reasonable inferences and presumptions in favour of the applicant where doubt exists, and that doubt must necessarily be in the minds of the Commissioners as they are charged with the responsibility for the final decision.

Mr. Power and Mr. Decker, members of the Pension Commission who appeared before your Committee, gave other interpretations.*

Your Committee has noted the opinion of Mr. Anderson, to the effect that any attempt to issue an official interpretation of the meaning of Section 70 would shackle the discretion of the Commissioners. If this is so, an official interpretation would not limit the discretion of the Commission as a whole, as it would retain the power of revision of the interpretation. In the view of your Committee, a body such as the Commission, having the task of interpreting and applying a section of such obvious difficulty, should direct its attention to arriving at the best and most workable definition or means of application available from its collective experience and ability. Directives and guidelines in other areas have apparently been acceptable, and it is difficult to see why an exception should have been made in an area as important as that of Section 70.

The representations made to your Committee, and the historical material quoted herein, show quite clearly that there are a variety of ways in which this section can be interpreted. The failure of the Commission to prepare and promulgate an interpretation has created some disadvantage for those who appear before the Commission on pension applications. This

* See pages 270 and 271 hereof.

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failure has also hindered Parliament in its attempts to remedy the situation, in that it has been difficult to determine what it is expected to correct.

Another result of the Commission's omission to clarify its interpretation of the intent of this Section is the uncertainty which exists concerning several aspects of pension adjudication. For example, the question of onus under the Pension Act has never been made clear. Your Committee noted a wide spectrum of views on this question, running all the way from the suggestion that the veteran needed only to make application and the onus was on the Commission to prove there was no case for pension, to the concept that the onus was on the veteran to establish a preponderance of proof as in civil cases.

The meaning of the word "conclusive" in Section 70 seemed to be a subject of misunderstanding. One view was that the words "it is not necessary for him to adduce conclusive proof" in Section 70 meant that he had to produce what might be termed almost conclusive proof. At the other extreme the view was that these words left the applicant responsible only for a minimal degree of proof. There was also a wide diversity of opinion as to whether the benefit of the doubt applied to such things as credibility and conflicting medical opinions.

Your Committee considers that, within the terms of the legislation, the Commission could have laid down some guidelines concerning these questions. These guidelines could have served to clear up misunderstandings and to facilitate the task of those who appeared before the Commission in support of pension claims.

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Section 5(5) of the Act makes the Commission the final authority on any question of interpretation under the Act. Under Section 7(4) of the Act the powers of the Commission in many instances are exercisable by a quorum of two Commissioners. Under Sections 62 and 65, provision is made for appeal boards of three Commissioners, with powers of final disposition. There has been a marked tendency on the part of the Chairman and the Commission to leave these quorums and boards to their own devices in questions of interpretation, particularly in regard to Section 70.

The justification for this by the Commission has been two-fold. In the first instance the Commission claims it does not have the right to instruct quorums, boards, or individual Commissioners on questions of interpretation. In the second place, Commission Chairmen have repeatedly stated that to define is to restrict and this would re-act to the disadvantage of the applicant.

With regard to the contention that the intent of Section 5(5) is to allow each Commissioner to proceed completely on his own, it needs only to be pointed out that the Commission has found it convenient to pass resolutions for interpretation of other Sections.* As to the fear of restricting by defining, suffice it to say that this fear did not extend outside of the Commission. The representations made to your Committee indicate that applicants and those who represent them do not share this fear.

The powers granted under Section 5(5) are wide. In your Committee's view, avoidance of interpretation is a strange exercise of the power to

* See Chapter 12 on Regular Forces, Volume II, page 440 dealing with Sections 13(2) and 14 of the Pension Act.

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interpret. The fear that the discretion of the individual Commissioner would be fettered * appears groundless. In the first place, all Commissioners would participate in any proceedings to adopt guidelines. Moreover, in the final analysis, each Commissioner may use his own judgment in assessment of the facts within any designated guidelines.

Interpretations were issued by the President of the Pension Appeal Court, Mr. Justice J.D. Hyndman, who promulgated the views of his court to the application of the benefit of the doubt clause in a public statement at the opening of the Court on February 2nd, 1930. The Court continued to provide published interpretations of this clause in regard to specific cases. The failure of the Pension Commission to decide upon, and to issue, an interpretation with respect to Section 70 needs no further elaboration.

Your Committee has recommended that the benefit of the doubt clause be made to apply specifically to adjudication. This recommendation will be explained elsewhere in these comments. If the revision, as proposed by your Committee, is accepted the Act would contain some basic principles regarding benefit of the doubt. The publication of guidelines concerning the application of these principles could then be issued by the Pension Commission in the form of "pension law directives", in accordance with the proposal made elsewhere in this report.

The proposed Pension Appeal Board would be charged with the final powers of interpretation. It is envisaged that this Board would serve to resolve questions of interpretation in regard to the benefit of the doubt. These interpretations could then be promulgated in the form

* See page 272 hereof

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of these pension law directives.

Proposed Amendment - Section 70

The term "benefit of the doubt", in its existing form, has application in two areas in pension administration. One is where the benefit of the doubt represents a factor in support of a claim when, at the adjudication stage, the body adjudicating is in doubt. Secondly, the benefit of the doubt clause, through general usage, has come to have a wider meaning, in that it has been generally regarded as an expression of the intent and purpose of the Act.

Your Committee desires, firstly, to submit supporting comment in regard to the recommendation that the benefit of the doubt clause be revised so as to make it applicable only to the adjudication process. As a preface to this comment, it is necessary to outline the successive stages of adjudication, as envisaged in your Committee's proposals. These are set out hereunder:

Initial application: The Pension Commission, represented by one or more Commissioners, would consider a pension application, this consideration being in the form of a review of documentary evidence. The case for the applicant would be contained in the application form, medical reports and other reports, and in some instances a military board of enquiry. This procedure would apply to all applications for entitlement and all benefits under the Pension Act.

Second and Renewal applications: The Pension Commission, represented by one or more Commissioners, would process second and renewal applications on the basis of a review of documents. In addition to the documents available at the initial application stage, the Commission could have available further documentary evidence, including a written submission by the Veterans' Bureau or by a veterans organization or other party acting on behalf of the applicant. This procedure would apply to applications for entitlement and all other applications under the Pension Act.

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Entitlement Board: At this stage a hearing would be conducted to provide the applicant with an opportunity to appear before a board of three Commissioners, accompanied by his advocate and others, including supporting witnesses. This hearing would be conducted in a semi-judicial setting. Evidence would be taken on oath and the applicant, the advocates and the witnesses would be questioned by the presiding officer and members of the Board. The hearing should not, however, be of such formality that the applicant is made to feel that he is in the atmosphere of a court and the proceedings should be conducted in a non-adversary manner. The case for the applicant would be made in the form of a brief supported by oral argument. Evidence used by the Commission would be open to examination by the applicant or the advocates at this stage. This procedure would apply to entitlement claims.*

Leave to Re-open: Decisions of the Pension Commission regarding leave to re-open a case where refusal has been given by an entitlement board would be conducted at a special "leave to re-open examination" conducted by one or more Commissioners. This examination would involve a review of all available documentation, plus a written submission and an oral presentation by the applicant, pensions advocate or other representative.

Personal Appearance under Section 7(3) of the Act: Personal appearances would be conducted before one or more Commissioners and would provide an applicant with the opportunity of making a request in person in regard to benefits under discretionary sections of the Act, or in regard to assessment or the degree of aggravation of a disability. The Commissioner or Commissioners conducting a personal appearance would have available the documentary evidence and would be able to question the applicant who may or may not be accompanied by a pensions advocate or other representative, at his discretion.

Personal appearances are provided mainly for the purpose of permitting the applicant to present himself before the Commission, at which time he could verify evidence and explain the circumstances of his complaint. There would be no opportunity for the applicant to challenge evidence available to the Commission. Should this be necessary, such evidence could be made available for examination on behalf of the applicant at the Pension Appeal Board stage, provided that a hearing is granted by the board. This "personal appearance" procedure would apply to all forms of application except entitlement.

* An abbreviated form of hearing is proposed also under the name of "Examiners Hearings". See Chapter 5, page 129 hereof.

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Appeals: The procedure for adjudication on an appeal to the Pension Appeal Board would be:

- (1) A review of the written record;
- (2) A review of the written record, plus a personal appearance by a representative of the appellant; or
- (3) A hearing de novo.

Where a hearing is conducted, the comments in regard to entitlement boards above apply. The case for the applicant should be submitted in the form of a brief supported by oral arguments. In some instances, there would be a written submission from the Commission. Evidence collected by the Commission or by the Appeal Board would be available for examination by the applicant or the advocates at this stage of the proceedings. This procedure would apply to applications for entitlement and all other applications under the Pension Act.

Onus

The question of onus, in respect of an applicant under the Pension Act, would apply only at the first application stage. He would, at that time, be required to make out a prima facie case which means that the application would be based on sufficient evidence to establish his claim to pension, unless rebutted. This prima facie case could be reinforced by further evidence on behalf of the applicant at later stages of the proceedings if necessary.

The requirement upon the Pension Commission, as set out in Section 59(1) relative to applications arising out of World War I and Peacetime Service * is that the Commission shall:

Collect such relevant information, if any, as may be available in the records of any department of the Government of Canada and make, through its medical and other officers, such inquiry as appears advisable into the facts upon which the application is based.....

* Section 60(1) makes similar provision for applications arising out of World War II.

Comment

Clarification appears necessary in regard to what is sometimes referred to as the onus upon the Commission to procure evidence to set off additional evidence submitted on behalf of an applicant, subsequent to that first presented with his claim. Sections 59(5) and 60(6) of the Pension Act require the Veterans' Bureau to prepare a summary of "all available evidence". This has been interpreted by some to mean that the responsibility is on the Veterans' Bureau to represent both sides of the case. Your Committee considers this unsound, and has recommended elsewhere in this Report that the Veterans' Bureau be required to produce only evidence in support of the claim; and that the Commission be responsible to prepare a precis setting out the reasons for refusal, such precis to refer to the evidence against the claim.

In recommending that Section 70 be amended to incorporate the principle that the onus upon the applicant shall be limited to that of making out a prima facie case, your Committee is attempting to settle a long-standing controversy. In considering the benefit of the doubt, there has been much discussion in past years as to the shifting of onus between the applicant and the Pension Commission. Your Committee considers that the benefit of the doubt clause, as it applies specifically to adjudication, should make it abundantly clear that the only onus upon the applicant is to make out a prima facie case, and thus his case will stand, unless rebutted.

Under the statute, in Sections 59(1) and 60(1), the Commission is directed to collect such relevant information as may be available

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in government records. It is also authorized to make enquiry through its medical and other officers. As your Committee views it, this enables the Commission to carry out its function of balancing the interests of the taxpayer with those of the applicant, within the framework and intent of the Act. The term "onus" in legal parlance relates to an antagonistic or contested proceeding and does not accurately describe the circumstance of a body such as the Commission making an investigation. To carry out its responsibility the Commission must have a wide power to secure information. Its aim as an adjudicating body should be to arrive at the true state of affairs, rather than to advance or defeat any particular point of view. The term "onus" has been used improperly in regard to the Act. Any misunderstanding should be removed.

Inferences

The existing benefit of the doubt clause states "the body adjudicating on the claim shall draw from all the circumstances of the case, the evidence adduced and medical opinions, all reasonable inferences and presumptions in favour of the applicant".

Your Committee considers that the requirement for the Commission to apply presumptions is meaningless because of its broad generality. A presumption is effective only when the circumstances under which it arises are clearly stated. In this respect, your Committee has recommended elsewhere that the veteran should be entitled to the presumption that his medical condition was that as shown on his enlistment documents, unless a condition manifested itself within three months of enlistment. This presumption should be stated in the Act. Spurious presumptions, as permitted by the section at present,

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are unrealistic.

The words "and presumptions" were added by recommendation of a Parliamentary Committee, which had considered (and discarded) the feasibility of including a presumption clause as a subsection to the benefit of the doubt clause.

The effect of adding the words "and presumptions" served but to confuse further the muddled situation which had grown up around the meaning of this Section of the Act. The inclusion of these words meant that the Pension Commission must attempt to "draw" presumptions. This must have posed a perplexing problem for those in the Commission who are familiar with legal concepts, for the reason, as stated earlier, that presumptions are normally contained in the legislation itself.

It is perhaps understandable, then, that because presumptions and inferences are lumped together in the Act, many people found great difficulty in trying to decide the actual meaning of the phrase "the body adjudicating on the claim shall draw from all the circumstances of the case, the evidence adduced and medical opinions, all reasonable inferences and presumptions in favour of the applicant". No doubt, in the minds of many, the meanings of the two words were lumped together. Your Committee feels that, in any revision of the Act, the benefit of the doubt clause should contain no reference to presumptions, but should be confined to inferences.

If the veteran is to be given the benefit of any inferences which can be drawn in his favour from the evidence, this should not necessarily await the stage in the proceedings when the benefit of the doubt is being applied. In other words, from the first act of consideration,

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the Pension Commission shall be required to draw any reasonable inferences in the applicant's favour.

To put it still another way, the inferences drawn in the applicant's favour may result in acceptance of evidence of sufficient weight to give him a preponderance. Apart altogether from the benefit of the doubt, the Commission, in considering the value of the evidence adduced, should be appreciative of the problems and disadvantages under which the applicant is placed in his attempt to secure evidence. Application of the inference would extend to the acceptability and the weight of the individual points of evidence.

In clarification, the benefit of the doubt clause should be amended so as to ensure that reasonable inferences would be drawn in favour of the veteran, and that they would apply from the outset in what might be termed the stages of consideration, and the drawing of these inferences should be held as distinct and apart from the function of applying the benefit of the doubt.

It should be apparent that the weight of a particular piece of evidence, accepted because of an inference drawn in an applicant's favour, should not be discounted because it came in by way of inference.

This approach regarding inferences would apply, in the first instance, when a decision is being made in regard to an initial application for entitlement or other matter. It would apply also at all succeeding stages of adjudication by the Commission, i.e., renewal application, entitlement board and leave to re-open, and to appeals under Section 7(3) of the Act. It would also apply to consideration of the proposed Pension Appeal Board.

CommentPreponderance

In suggesting that the benefit of the doubt should be applied solely in the process of adjudication, it is necessary to clear up some misconceptions. Your Committee does not consider that the benefit of the doubt, as it is used in the Pension Act, can be equated to the principle of criminal law where the onus is upon the state to prove its case "beyond a reasonable doubt". Such concept is used in an entirely different type of proceeding to that of pension adjudication. It is incorrect also, in your Committee's view, to equate the principle under the Pension Act with the benefit of the doubt rule applied in civil courts. In proceedings under the Pension Act there are no two sides as such; hence the decision cannot be made on the basis of preponderance of evidence favouring one side or the other.

Sight must not be lost of the fact that proceedings under the Pension Act are by way of enquiry, not by trial. Once the applicant has established his basic claim, the matter becomes one of examination. The Pension Commission is charged with the responsibility to decide whether the claim is valid. In carrying out its function it has powers of investigation.

Your Committee views adjudication of an application as a step-by-step process.

- (1) The application is given initial consideration on the basis of the prima facie case.
- (2) If the prima facie case is not rebutted, the application succeeds.
- (3) If there is evidence rebutting the prima facie case then the weight of all the evidence is considered. If the scales are balanced, or if the balance is in the veteran's favour he succeeds.
- (4) If the preponderance of evidence is against the veteran he may be given the benefit of the doubt, and the matter is resolved in his favour.

N.B. Inferences are to be drawn in favour of the applicant as each item of evidence is considered.

CommentApplication to Evidence of the Proposed Amendment to Benefit of the Doubt

The Pension Commission appears, over the years, to have evolved a generous policy in regard to rules of evidence, as they are normally interpreted in courts of law. Your Committee feels that this policy is a correct one, particularly in view of the frequent difficulty in obtaining relevant documents. Moreover, the nature of a claim under the Pension Act is often such that, in many instances, the evidence which would be required in a court of law is not obtainable at all in pension cases. It appears that the Commission has largely succeeded in making proper allowances for special circumstances and problems in regard to the admissibility of evidence.

There is, of course, a distinction between admissibility and credibility of evidence. It is not surprising that this was not always clear in the minds of those making representations to your Committee in respect to Section 70. The Commission, having developed a generous attitude as to admissibility of evidence, makes use of a great deal of evidence that is secondary or indirect. Occasionally, at Appeal Board hearings for example, there is some direct evidence. This is the exception rather than the rule.

Indirect or secondary evidence can make for difficult assessment as to credibility. It is usually easier to decide on the credibility of a witness who can be seen, heard, and, in effect, sized up. To

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decide whether a person giving direct evidence is truthful or not, apart from corroboration, is a most intangible process.

With secondary or indirect evidence, such as letters, there is less opportunity to test the truthfulness of the matters set out. The fact that the Commission readily admits such evidence should, in your Committee's view, dispose it to a tolerant attitude. In other words, a strict approach to credibility could well destroy any advantage of a tolerant attitude to admissibility.

From this it will be seen that the Commission has a special problem with what is usually referred to within the Commission as lay evidence. It has already been pointed out that, in applying the benefit of the doubt, the weight of evidence should not be discounted because it has been arrived at by inference. Where facts are arrived at by inference drawn in the applicant's favour, credibility would not be involved. In general, however, your Committee does not consider that it is practicable to apply the benefit of the doubt to questions of credibility of lay evidence. The fact that questions of credibility are subjective to the adjudicator makes it the more difficult.

The application of the benefit of the doubt to medical evidence requires different analysis. Here the question of credibility will rarely appear. If a physician is giving evidence as to a factual situation such as to when and where a man was injured, the usual problems of credibility are present. Evidence of this nature, however, while not strictly professional will be given in a professional context that will substantially reduce the question of credibility. Where

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the evidence is given by the physician as a professional or expert witness it is opinion evidence and the problem is that of deciding upon the weight which it should be given.

Where there are conflicting opinions the problem is still one of preference although this may involve the rejection of the evidence of a particular witness. Such rejection is not based upon the lack of good faith or integrity. It is, rather, the rejection of one opinion in favour of another.

While acknowledging the difficulty of assessing differences of medical opinion, it is the view of your Committee that in such instances inferences could properly be drawn in favour of the applicant, and in the final step of the adjudication he could be given the benefit of the doubt.

Intent and Purpose

Your Committee considers that much of the confusion surrounding the benefit of the doubt clause stems from the fact that it has been interpreted by many as setting out the general intent and purpose of the Act.

Those who have suggested that this benefit of the doubt clause, as it now exists, has a wider meaning than that which can be applied solely in the process of adjudication may well have just grounds for this view, inasmuch as the clause is open to many interpretations. Your Committee's opinion is, however, that in attempting to apply the clause throughout the entire Act, its effectiveness has been dissipated. Hence, your Committee recommends that it be given a strict application only to the adjudication process.

COMMENT

The limitation of the benefit of the doubt clause to adjudication makes it desirable to recommend the adoption of a new clause setting out intent and purpose. Your Committee considers that a special clause in the Act should make it clear that all sections must be administered or interpreted in the most liberal manner.

Your Committee was impressed with the views stated in the document * prepared in 1917 by Mr. Kenneth Archibald, Legal Advisor to the Board of Pension Commissioners, which is believed to have been the foundation of our Pension Law. These views are set out in detail on page 7 of the document and cites three basic principles, which are:

A pension is given as a mark of gratitude.
 A pension is given in payment of a debt.
 A pension is given to provide subsistence.

As Mr. Archibald stated, these three basic principles are applied in our Pension Act, more or less indiscriminately, and are inextricably intertwined. Taken together, they would seem to mean that, through the measure of this Pension Act, the country can express its gratitude to those who suffered loss by reason of military service. The country can also fulfill what amounts to a contractual obligation to compensate a member or his dependents for such loss. Lastly, this compensation can be in a form of financial allowances to provide subsistence.

* There is no proof that this document was prepared by a Mr. Archibald. However, Sections from it have been quoted in the 1919 Special Committee on Pensions and Pension Regulations and in the Report of the Royal Commission on Pensions 1923-24. The Report of the 1919 Special Committee mentions, in its table of Contents, a Report entitled "Recommendations of Board of Pension Commissioners and Interpretation of Regulations (Mr. Archibald) which contains quotations from the 1917 document. The Report of the Royal Commission, Sessional Paper 203, page 44 quotes from the 1917 Report identifying the extract as being from "A Memorandum prepared by those who had in charge the drafting of the Act". Your Committee, after studying the various reports involved, believes that the Report referred to was prepared by Mr. Archibald.

Comment

Your Committee now holds the view that all these principles should be set out in a separate clause and has so recommended.

Conclusion

In retrospect, while the benefit of the doubt clause has no doubt assisted many applicants, it has raised many false hopes. In many instances, the basis of a pension claim may not have been clearly established, particularly where differences of opinion existed regarding medical factors and lay evidence. Generally there has been a tendency to expect that such claim would succeed on the strength of the benefit of the doubt clause. Too often it has proved to be but a will o'the wisp.

The benefit of the doubt has created other difficulties, more general in nature. The spokesmen for veterans organizations understandably placed great faith in the benefit of the doubt clause, considering that if the Commission were to apply it properly, the difficulties would be overcome. Your Committee considers that this approach was absolutely valid but experience has been a respected teacher in this regard. It seems obvious that the Commission did not consider that the benefit of the doubt clause was of sufficient weight to permit it to pay pensions to the extent as envisaged by veterans organizations. Hence, here again, the existence of this clause in its loosely-worded state may have been harmful in some respects.

Your Committee has suggested that the benefit of the doubt clause be re-worded, and that it be applied specifically to adjudication. This should bring its application within reasonable limits and should make the clause more readily understandable. The benefit of the doubt can never

Comment

be a complete answer to all the problems of the applicant and those who support him. The aims of the Act are directed to an area charged with emotions and strong feeling. Your Committee agrees with the Commission Chairman that no matter how clear the legislation, or how well it is administered, it is not possible to please everyone. That is, of course, not its purpose.

Clarification of this Section, however, should lighten the task of the Commissioners. In the first place, it would make the process of adjudication more precise. Secondly, it would serve to delineate the areas of discretion, particularly in regard to questions of onus, inferences and the weight of evidence required for an application to succeed. It should also define the task of the advocate and place him in a position to make more effective use of his available resources. In the result, the applicant should have a better idea of where to expect help under this clause.

Your Committee considered a number of approaches to amendment, and in particular to that which would require the Commission to rule in favour of the applicant in every step of the proceedings, where there was doubt. Such an approach would not, in your Committee's view, meet a major defect of the present section, namely too much generality or lack of precision. The suggested answer is in the recommendation that the question be reduced to one of preponderance.

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6. Ibid, Volume II, page J-16
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8. Ibid, Volume II, page J-24
9. Ibid, Volume III, page L-3
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12. Proceedings of Committee Sessions, Volume III, page L-5
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14. Ibid, Volume III, page L-20
15. Ibid, Volume III, pages L-25 to L-31
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17. Bill C-7, 1963, A Bill to amend the Pension Act (Judicial Appeal)
18. Proceedings, Standing Committee on Veterans Affairs, 1963, page 15
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23. Ibid, Volume IV, page Q-4
24. Ibid, Volume IV, page P-7
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26. Ibid, Volume IV, page P-20
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33. Ibid, Volume V, page V-10
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38. Ibid, Volume VI, page DD-16
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43. Ibid, Volume VI, page KK-143
44. Ibid, Volume VII, page MM-50
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51. Ibid, Volume VII, page NN-45

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55. Report, Royal Commission on Pensions and Re-establishment, 1923-24 Sessional Paper 154, page 114
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57. Ibid, page 91
58. Proceedings, Special Committee on Pensions, Insurance and Re-establishment, 1924, page 407
59. Report, Special Committee on Pensions and Returned Soldiers' Problems 1928, page 85
60. Ibid, page 92
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62. Report, Special Committee on Pensions and Returned Soldiers' Problems, 1930 page IX
63. House of Commons Debates, May 20th, 1930, pages 2426-27
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GENERALAPPLICATION PROCEDURE

Applications for basic entitlement under the Pension Act are governed by Section 57 thereof, which reads as follows:

57. The procedure governing applications for entitlement to pensions under Section 13 shall be as provided by Sections 58 to 68.

The provisions in Sections 58 to 68, which deal with the application procedure, are explained hereunder:

World War I and Peacetime

First Hearing: The legislative authority for the procedure known as "First Hearing" is in Section 59(1), as follows:

- 59(1) When an application with respect to service in World War I or in peacetime is first made to the Commission after the 1st day of August 1936, the Commission shall expeditiously consider such application and shall collect such relevant information, if any, as may be available in the records of any department of the Government of Canada and make, through its medical and other officers, such inquiry as appears advisable in to the facts upon which the application is based; if satisfied on the material available, that the applicant is entitled to a pension, the Commission shall then award such pension, and shall take the necessary steps to cause payment of such pension to be made.

Second Hearing: The "Second Hearing" procedure is provided in Section 59(3), as follows:

- 59(3) If requested in writing so to do within a period of ninety days of the date of mailing notification as set forth in subsection (2) the Commission shall arrange for a second hearing subject to the following conditions:

- (a) That additional evidence may be submitted:
- (b) That prior to a second hearing, the applicant has submitted to the Commission a statement, signed by himself, setting forth all disabilities or disabling conditions that he claims to be the result of injury or disease or aggravation thereof attributable to or incurred during military service, in regard to which he may desire to claim pension; and

GENERAL

- (c) That after a decision has been rendered by the Commission on such second hearing, the Commission may entertain no further application in respect of any disability whatsoever other than an application before an Appeal Board of the Commission, as hereinafter provided.

World War II

Initial Hearing: The authority for the procedure known as "Initial Hearing" is found in Section 60(1), as follows:

- 60(1) In respect of all applications for entitlement to pension arising out of World War II the Commission shall expeditiously consider each application and shall collect such relevant information, if any, as may be available in the records of any department of the Government of Canada and make, through its medical and other officers, such inquiry as appears advisable into the facts upon which the application is based; if satisfied, on the material available, that the applicant is entitled to a pension, the Commission shall then award such pension, and shall take the necessary steps to cause payment of such pension to be made.

Renewal Hearing: The "Renewal Hearing" procedure is provided in Section 60(3), as follows:

- 60(3) When the applicant renews his claim before the Commission, as provided for in subsection (2), and the Commission is satisfied, on the material available, that the applicant is entitled to pension, it shall award such pension and shall take the necessary steps to cause payment of such pension to be made, but if this renewed application is not wholly granted, the Commission shall notify the applicant in writing, of its decision, stating as before, the grounds therefor, and shall inform him that he may, if he so desires, appear before an Appeal Board of the Commission.

Subsequent Renewal Hearings: Provision for Subsequent "Renewal Hearings" is provided in Section 60(4), as follows:

GENERAL

60(4) The Commission may, in its discretion, entertain a further application in respect of any injury or disease resulting in disability, prior to a hearing by an Appeal Board of the Commission, but after a hearing by an Appeal Board, the Commission may entertain no further application in respect of any injury or disease whatsoever, subject, however, to the provisions of subsection (4) of Section 65, respecting leave to re-open an application in certain instances.

In summary, the procedure for applications arising out of service in World War I or in peacetime provides for a first and a second review of the application by a quorum of the Pension Commission, following which the applicant must proceed to appeal. The procedure for applications arising out of World War II service is that the applicant is entitled to an initial and one further review, plus such further reviews as the Commission, in its discretion, may grant. This means, in effect, that the person applying as the result of World War II service does not have to proceed to appeal after the second review of his case by the Commission, as is the case for applications involving service in World War I and in peacetime. In practice the Commission is usually prepared to grant the World War II applicant as many "renewals" as the applicant, or those representing him, may desire.

There is no provision in the Act for an application procedure in regard to discretionary benefits such as:

- Payment of last illness and burial expenses
- Compassionate pension
- Attendance Allowance
- Retroactive effect of an award
- Pension for dependent parents
- Pension for brothers or sisters.

Further, there is no regular procedure under which a pensioner can apply for increase in assessment or an increase in the degree of aggravation.

GENERAL

In the absence of official procedures to cover requests involving discretionary benefits or increases in assessment or degree of aggravation, the Pension Commission follows the policy of accepting a letter or other notification from an applicant, an advocate, or a veterans organization, such being disposed of by a quorum of the Commission on initial review only. There is no provision for second or subsequent review, or for appeal. Application forms exist for Attendance Allowance, Last illness and burial expenses and pension for dependent parents, brothers or sisters. There is, however, no statutory or official procedure for handling these applications.

COMMITTEE RECOMMENDATIONS

(27) That the procedure for all applications be established as follows:

1. First application;
2. Second application;
3. Renewal applications based on new evidence, such not to be limited in number, *

Three-stage
Procedure

(28) That the "statement of claim" required to be signed by an applicant refer only to those conditions for which the applicant is requesting an entitlement ruling, and that, in seeking an entitlement ruling, the applicant must request such ruling on all conditions for which he is claiming pension at that time.

"Statement
of Claim"

(29) That the Commission shall entertain a renewal application for entitlement on the submission of additional evidence.

Renewal
Entitlement

(30) That first, second and renewal applications for entitlement be approved or rejected by an individual Commissioner acting in the capacity of an "Entitlement Officer", thus providing that such Commissioner be empowered to act for the Commission in the disposal of such applications.

Entitlement
Officer

(31) That the Commission shall entertain a renewal application for a discretionary benefit, an increase in assessment or an increase in the degree of aggravation on submission of additional evidence.

Renewal:
Discretionary
Assessment
Aggravation

* See Recommendation No. 12, page 77 hereof.

COMMITTEE RECOMMENDATIONS

- (32) That first, second and renewal applications for discretionary benefits be approved or rejected either on authority delegated to administrative staff, or by the Commission.
- Disposition:
Discretionary
Benefits
- (33) That first, second and renewal applications for increase in degree of assessment or for increase in degree of aggravation be approved or rejected by one Commissioner empowered to act for the Commission in disposal of such applications.
- Disposition:
Assessment and
Aggravation
- (34) That an applicant be permitted to proceed directly from first application to an Entitlement Board in entitlement claims, or personal appearance under Section 7(3) for other benefits, should he not wish to submit his application for second or renewal adjudication.
- Second or
Renewal
Applications
Not Mandatory
- (35) That standard application forms be implemented for the following:
- Application
Forms
1. Entitlement (including Leave to Re-Open)
 2. Discretionary benefits
 3. Increase in assessment
 4. Increase in degree of aggravation
- (36) That, in its discretion, the Commission be empowered to consider an application in form of a written submission from a veteran or from those representing him, without the formality of an official application form.
- Informal
Applications
May be
Considered

COMMITTEE RECOMMENDATIONS

(37) That, where an application is not wholly granted, the Commission be required to prepare its decision on specially-designed forms to be known as "Decision of the Commission" (for adjudications below the level of Entitlement Boards) and "Decision of Entitlement Board"; and that, for the latter, a standard format be used as proposed in Recommendation No. 15(N) on Page 133 hereof dealing with Entitlement Boards.

Decisions to
Be Written on
Prescribed
Forms

(38) That the decision of the Commission at the level of adjudication below that of Entitlement Board be written in a form sufficient to provide the applicant and those who represent him with adequate information concerning the issues, the evidence, the law, the inferences and presumptions, findings of facts and the conclusions of law.

Format for
Decisions

COMMENTGENERAL

Your Committee considers that the procedures for applications for entitlement and other benefits under the Pension Act are unnecessarily complicated. The Act provides two different procedures for entitlement applications, one for persons who served during World War I and in peacetime, and another for those who served during World War II. There are no procedures, as such, for benefits other than entitlement. The latter are handled by the Commission under a practice known as "unstamped" decisions and provides a "one shot" basis of adjudication, with no provision for appeal.

A prime illustration of the manner in which applications can become entangled in matters of procedure would be where a World War II pensioner claims additional pension for a condition which he considers to be consequential upon a pensioned condition. Such application is frequently considered as an "unstamped" decision and is subject only to an initial adjudication with no renewal or appeal involved. If the Commission gives an unfavourable ruling, the applicant can ask for an initial ruling under Section 13 (Entitlement) on the grounds that the condition was attributable to or was incurred during war time service, or that it arose out of or was directly connected with peacetime service. Such application would go through the appropriate form of initial and subsequent adjudication by the Commission and could then proceed to an Appeal Board hearing.

If refused, the applicant could then apply for leave to re-open on the grounds that the condition was aggravated by service. In this respect he would be accorded to a special Appeal Board hearing and, if granted, to an initial and subsequent review by the Commission and a further Appeal Board hearing.

COMMENT

There are application forms for some discretionary benefits (e.g., last illness and burial expenses and pension for dependent parents, brothers or sisters.) No application forms exist for other discretionary benefits including compassionate pension, retroactivation or increase in assessment or in the degree of aggravation .

Your Committee has recommended the establishment of official procedures regarding both entitlement and other benefits under the Act. These are explained in some detail hereunder:

Three-stage procedure for all forms of applications

Your Committee considers that the continued use of different procedures for those who served in separate wars cannot be justified. The procedure for World War II applications provides for an initial and a renewal hearing, and further renewals at the discretion of the Pension Commission. The renewal hearings must be based on new evidence. The applicant and those representing him can make supplementary submissions at the renewal stages and, in the view of your Committee, it can be said that these procedures provide ample opportunity for the Commission to make its decisions, favourable or otherwise, on the basis of the application and supporting evidence of a written nature. Where a decision remains unfavourable, the appropriate step is for the applicant to proceed to the "hearing" stage.

Your Committee has recommended that this procedure, as it now applies for World War II applications, be implemented for applications arising out of service in World War I and in peacetime. Also, this procedure should apply to discretionary benefits, and to requests for increase in

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assessment and increase in the degree of aggravation. This would provide three stages of adjudication, i.e., first application, second application, and renewal applications, with second and renewal application on new evidence.

Two slight modifications in this procedure are envisaged. Firstly, the adjudications through the first, second and renewal stages should not be called "hearings". The applicant does not appear at these adjudications and the process is limited to a review of documentary evidence. Hence, your Committee's proposal is to dispense with the use of the word "hearing" and call the procedure simply first application, second application and renewal application.

The second modification is to insert a "second application" between the initial and renewal stages. This appears desirable, and is considered justifiable as it would provide for a first and second application as a matter of right, with subsequent renewals at the discretion of the Pension Commission. Hence, your Committee recommends the terminology be adopted of first application, second application and renewal applications. This recommendation means that the existing Section 59 of the Act would disappear.

Amendment to Statement of Claim

In suggesting a new procedure, your Committee recommends removal of the requirement under Section 59(3)(b), that an applicant complete a statement citing all disabilities or disabling conditions that he claims to be the result of injury or disease or aggravation thereof attributable to or incurred during military service.

COMMENT

One of the present effects of having the applicant submit this statement describing all conditions (rather than only those for which he is requesting a Commission ruling) is that, should a new condition arise in future, an application in regard to it cannot be placed before the Commission, except with leave to re-open.

The Pension Commission is barred from accepting a further application in respect of a disability other than those set out in this statement, by reason of Section 59(3)(c) which reads as follows:

59(3)(c) That after a decision has been rendered by the Commission on such second hearing, the Commission may entertain no further application in respect of any disability whatsoever other than an application before an Appeal Board of the Commission, as hereinafter provided.

Your Committee presumes that the purpose of this provision in the Act was to prevent an applicant from running the full gamut of his procedural rights every time he desired to claim entitlement for a separate condition. This may have been a worthy objective. Your Committee cannot accept the premise, however, that an applicant should be limited in the use of the appeal procedure as at present. Under the existing legislation, when he is granted a hearing, he must list all potential disabling conditions and, when in receipt of a decision from the Commission on those conditions, he is prohibited from placing a new claim before the Commission, except with "leave to reopen" from a special appeal board.

The recommendations of your Committee are intended to provide fluid procedures which would make it possible for an applicant to apply for entitlement ruling for all conditions for which he is claiming pension at that time. Should a new condition arise, he could again make

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application before the Commission without having to seek leave to reopen. Admittedly this system does not provide a "finality" to pension applications. However, your Committee does not consider that such finality is desirable.

The recommendations of your Committee are designed to standardize in some measure the processing of applications. There would be one channel for both entitlement and discretionary benefits at the level of documentary review. When the application comes to the hearing stage there would be separate channels each leading ultimately to the Pension Appeal Board. The presence of such a Board may well result in an applicant's decision to forego second and renewal hearings. It may lead also to fewer applications for leave to reopen as the Commission, by refusing, will not be closing off the last resort of the applicant as is now the case.

Your Committee appreciates that the full effect of the suggested changes can only be determined by experience. It does not expect, however, that the work load would necessarily be increased by these recommendations. In addition the applicant would lose none of the procedural benefits at present available through the choice of procedures open to him.

Renewal Applications for Entitlement

In accordance with the present legislation, an applicant for entitlement may proceed to the renewal stage, following refusal as a "second application", only in the discretion of the Pension Commission. Your Committee

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considers this to be practical. The Commission should be empowered, at this stage, either to allow a further review on a documentary basis, or alternatively, to bring the case before an Entitlement Board in the form of a hearing. This would provide some measure of finality at the documentary review stage, at discretion of the Commission.

Entitlement Officer

Your Committee's recommendation that an individual Commissioner be empowered to act for the Commission in the role of "Entitlement Officer" should effect some economy of time. The procedure now followed for the handling of entitlement applications below the Appeal Board level of adjudication in large measure depends upon the work and decision of a single Commissioner. The applications are reviewed in depth by one Commissioner who writes the decision but does not sign it. The file is then passed to the "Board Room" where the decision is reviewed by two or more Commissioners, two of whom are required to sign it.

This somewhat awkward procedure undoubtedly arises from two separate provisions of the Act. Firstly, under Section 7(4) a quorum is designated as two or more Commissioners. Secondly, under Sections 62(5) and 68(3), members of the Commission who previously adjudicated upon a case may not sit as a member of an Appeal Board on the same case.

Your Committee is of the view that, in actual practice, each decision at the level below appeal is, in effect, made by the Commissioner who writes it initially and the practice of having these decisions signed by two other Commissioners has probably been invoked to comply with the requirement for a quorum.

COMMENT

Your Committee assumes further that, in order to reduce the number of Commissioners who would be ineligible to sit at an appeal on any one case, the Commission policy has been that the Commissioner who actually dictates a decision at any stage of adjudication below appeal does not affix his signature to it. This has the effect that only the two Commissioners who actually sign the decision are barred from dealing with the case, should it come before an Appeal Board.

Your Committee realizes that this was implemented in order to comply with the requirements of the Act, and that the intention behind the procedure was to simplify the work of the Commission. Your Committee considers, however, that the interests of all could best be served by amending the legislation to permit an individual Commissioner to have the power of the Commission in regard to the disposal of entitlement applications below the level of the proposed Entitlement Board.

Renewal Applications: Benefits other than entitlement

Your Committee considers that, in the same manner as for entitlement, first and second applications for benefits other than entitlement should be handled as a matter of right, and that renewal applications for these benefits should be at the discretion of the Pension Commission. This would mean that, following a first and second application, the Commission could permit a further review of the documentary evidence, or alternatively, could arrange for a personal appearance under Section 7(3) of the Act. As with entitlement cases, this could bring about some measure of finality in regard to documentary reviews of applications for these other benefits.

COMMENTDisposition: Discretionary Benefits

Your Committee has recommended elsewhere in this report that Pension Commissioners be relieved of the responsibility of making decisions in a number of relatively minor areas involving discretionary benefits. In what might be termed the major areas in respect to discretionary benefits, the responsibility for decisions should be left with the Commissioners. Reference is made to this matter at this time solely for the purposes of clarity. Full details will be found in chapter 11 dealing with "Routine Decisions".

Disposition: Requests for increase in Assessment or in Degree of Aggravation

As with entitlement, it seems necessary to regularize the adjudication procedure below the level of a hearing, in connection with requests for an increase in the degree of assessment or the degree of aggravation. Such applications could presumably be disposed of by an individual Commissioner acting for the Commission, on the understanding that should the Commissioner decide not to grant a renewal review, arrangements could be made for a personal appearance under Section 7(3) of the Act. The recommendation of your Committee concerning these personal appearances provides also that such may be arranged at the request of the applicant, should he wish to proceed to a personal appearance rather than ask for a further documentary review of his case at the renewal stage.

Second and Renewal Hearings not Mandatory

Your Committee has recommended that an applicant need not avail himself of the procedure which permits a second and, with the discretion of the Commission, a renewal consideration. There will be cases where an applicant perhaps acting on the advice of those who represent him, would prefer to

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proceed directly from the first adjudication to an Entitlement Board, or alternately a personal appearance under Section 7(3) of the Act. Your Committee is of the view that he should be allowed to forego the intermediate steps of second or renewal adjudications and have his case considered at a hearing stage directly after the "first application" at his own discretion; and that this should apply to both entitlement and personal appearances under Section 7(3).

Application Forms

Your Committee suggests that the Pension Commission produce standard application forms for entitlement, all discretionary benefits, and increases in assessment and degree of aggravation. A special application form should be used for "leave to re-open" in accordance with Recommendation No. 35.*

The Act provides that an applicant is a person who either makes a formal application for pension, or alternatively, one in whom a disability is shown to exist at the time of discharge from service, or from treatment or training by the Department of Veterans Affairs. The Section reads as follows:

- 2(b) "Applicant" means a person who has made an application for a pension, or a person on whose behalf an application for a pension has been made, or a member of the forces in whom a disability is shown to exist at the time of his retirement or discharge or at the time he ceased to be on active service during World War II, or at the time of the completion of treatment or training by the Department of Veterans Affairs.

The Pension Commission follows the policy, under authority of this Section, of considering that a person becomes an applicant for pension when:

- (1) He makes application for pension.
- (2) Someone applies for pension on his behalf.
- (3) He had a disability at the date he was discharged from the Forces.

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- (4) He had a disability at the time he ceased to be on active service during World War II.
- (5) He had a disability when he completed treatment or training by the Department of Veterans Affairs.

Your Committee considers that, in the circumstances envisaged in (1) and (2) above, it should be a requirement that a formal application form be completed by or on behalf of an applicant. It would appear satisfactory that, for the purposes of establishing the effective date of an award, documentary evidence such as a letter could be accepted as proof of an intention to apply and, if approved, pension could be effective from the date of receipt of such letter. There are grounds to suggest that, in the usual circumstances, a letter should not constitute an application. The use of a proper application form for all requests would provide assurance that the full details are made available to the Pension Commission at the first adjudication. Also, it would presumably reduce delays in cases where otherwise the Commission might have to withhold a decision pending securing of details which could have been made available at the time of the first application.

Informal Applications

Notwithstanding the suggestion above, your Committee does envisage certain circumstances where an application form would not be necessary. For example, the Veterans' Bureau or a veterans organization may possess full details on a case and may wish to request consideration. In these instances the Commission should be empowered to proceed with an application without the formality of an official form being signed.

Commission Decisions

Your Committee considers it essential that the Commission prepare

Comment

a full summary in regard to each decision where an application has not been wholly granted. Sections 59(2) and 60(2) of the Act provide:

Whenever such application is not wholly granted, the Commission shall promptly notify the applicant, in writing, of its decision, stating fully the grounds therefor.....

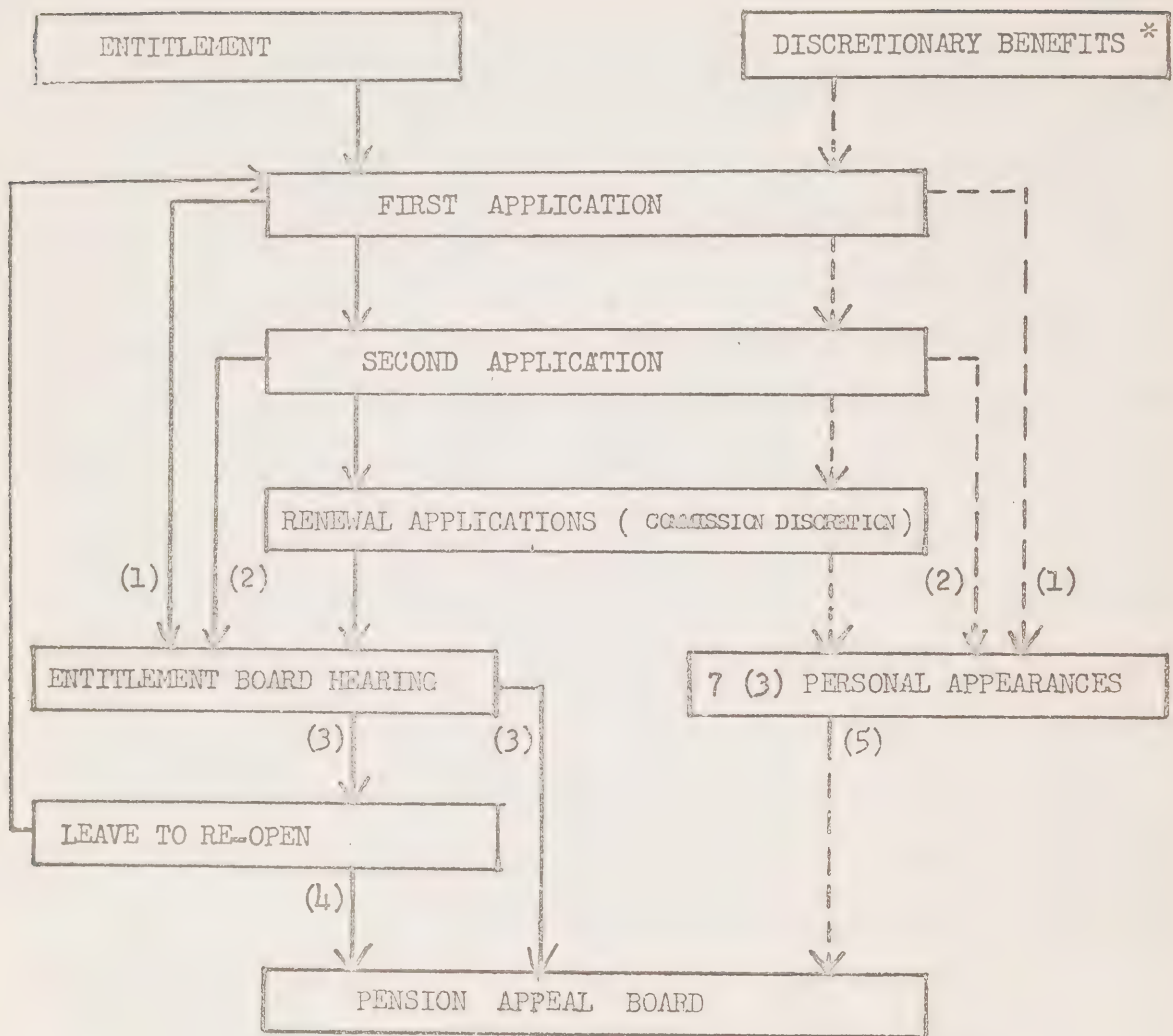
Your Committee reviewed a number of files in which it was noted that the Commission decision did not fully state the reasons for refusal. In other cases, the Commission had furnished fuller information, but there was no standard followed, with the result that the type of decision written appeared to be left to the discretion of the individual Commissioner, or to the quorum of Commissioners or Appeal Board members responsible for the decision.

Your Committee recommendation to the effect that Commission decisions should be written in more detail, and in accordance with a standard format, would achieve four desired results as follows:

1. The applicant or those who represent him would have a more complete explanation of the reasons for the Commission's refusal.
2. The decision would include all of the essential information;
3. A decision written in full detail would facilitate the task of the Chairman in maintaining quality control regarding Commission decisions, and;
4. Decisions, when prepared in accordance with a standard format, would be helpful when a case is being prepared for further consideration.

Chart

A chart outlining the proposed application procedure follows:

APPLICATION PROCEDURE (proposed)

1. Applicant may proceed directly from first application to Entitlement Board or 7(3) hearing.
2. Applicant may proceed directly from second application to Entitlement Board or 7(3) hearing.
3. Applicant may proceed to Pension Appeal Board or alternatively may ask for leave to re-open before the Commission.
4. Application to Pension Appeal Board as of right.
5. Application to Pension Appeal Board with leave

* Includes Increase in Assessment and Degree of Aggravation.

CHAPTER 10VETERANS' BUREAUGENERAL

The authority for the Veterans' Bureau is found in Section 11 of the Pension Act which reads as follows:

- 11(1) There shall continue to be a branch of the Department known as the "Veterans' Bureau" which, subject to the direction of the Minister, shall be administered by an officer called the Chief Pensions Advocate who shall be assisted by such other pensions advocates and such additional staff as may be required for the proper performance of the duties of the Branch.
- (2) Pensions advocates hereafter appointed shall as far as may be practicable, be barristers or advocates of good standing at the bar of any of the provinces of Canada.
- (3) The pensions advocates shall be appointed under and pursuant to the provisions of the Civil Service Act at such salaries as the Governor in Council may prescribe.
- (4) Repealed
- (5) One of the pensions advocates may be designated by the Minister to act as a travelling inspector of the Veterans' Bureau and to exercise constant supervision over the work and preparation of cases in the district offices of the Bureau.
- (6) The Veterans' Bureau, in addition to such duties in connection with the preparation and presentation of pension cases as are prescribed by the procedural sections of the Act, shall upon request advise pensioners and applicants upon any provision of the Act or phase of pension law or administration that may have a bearing upon their pension claims, whether in respect of entitlement to pension under Section 13 or otherwise, and when deemed by the Chief Pension Advocate necessary or advisable shall make written or oral representations to the Commission in furtherance of such claims.
- (7) For the purposes of subsection (6) pensions advocates are empowered to attend and assist the pensioner or applicant, or, in his absence represent him, at any hearing before the Commission or an Appeal Board thereof at which he is entitled to be present.

The duties of the Veterans' Bureau are amplified in the PROCEDURE section of the Act as follows:

General

- 58(1) Upon request in writing by an applicant, the Chief Pensions Advocate shall assist him in the preparation of his case and arrange for its presentation before the Commission or before an Appeal Board of the Commission by a Pensions Advocate; but if the applicant so elects he may have the same prepared and presented by a representative of a service bureau of a veteran organization or by some other person at his own expense.
- (2) For the purpose of assisting an applicant in the preparation of his case, the Veterans' Bureau may issue a questionnaire and form of application approved by the Commission.
- 59(4) If a second hearing is requested, as hereinbefore set forth, the Commission shall inform the applicant that, if he so desires, he may have the assistance of the Veterans' Bureau, free of charge, or a service bureau of a veteran organization, or other representative, at his own expense, in the preparation and presentation of his application; that a summary of all available evidence relating to his claim will be mailed to him, or to such representative as he may direct, by the Veterans' Bureau; and that his complete claim must be submitted to the Commission for decision within a period of six months of the date of mailing the summary by the Veterans' Bureau.
- (5) Upon request of an applicant for a second hearing; the Commission shall notify the Veterans' Bureau accordingly; and the Veterans' Bureau shall thereupon prepare a summary of all available evidence relating to the claim and shall mail a copy of the same to the applicant or as he may direct; but where the applicant is suffering from a neuropsychiatric disease it is within the discretion of the Chief Pensions Advocate whether the summary of evidence is furnished to the applicant.
- 60(6) Upon request of an applicant for an Appeal Board hearing the Commission shall notify the Veterans' Bureau accordingly and the Veterans' Bureau shall thereupon prepare a summary of all available evidence relating to the claim and shall mail a copy of the same to the applicant, or to such representative as he may direct; but where the applicant is suffering from a neuropsychiatric disease it is within the discretion of the Chief Pensions Advocate where the summary of evidence is furnished to the applicant.

General

The primary duty of the Veterans' Bureau is to advise and assist applicants for pension in all matters adjudicated upon by the Pension Commission. The services of the Bureau are without charge. The Bureau does not assist an applicant until he requests assistance. This permits the applicant to provide definite instructions to the Bureau before it takes any action on his behalf.

The Bureau has a head office at Ottawa, consisting of five advocates and clerical staff. In addition, the Bureau has District Pension Advocates in the district offices of the Department of Veterans Affairs across Canada.

The Act provides that advocates, so far as may be practical, should be barristers, in the belief that persons with legal qualifications are more adaptable to the specialized pension work of the Bureau.

The role of the advocate is unique in that his responsibility is to assist the applicant for pension, and the only duty he owes to his employer (the Crown) is to do his utmost to assist this applicant. An applicant for pension has the right to expect from the advocate, without charge, the same service as an applicant would demand of his solicitor in civil litigation.

In practice the District Pensions Advocate, who is in direct contact with the applicant, is responsible for preparation of the claim. The first step taken by the advocate is to prepare a complete history of the case. He has access to the applicant's district office file and will request, through the Veterans' Bureau at Ottawa, such information as may be available at Head Office of the Department or through War Service Records. In addition, the applicant can obtain such other information as may be pertinent, including a medical opinion from a specialist employed by the Department or, in certain cases, from independent sources.

General

When the advocate has secured all necessary information he will submit the case through the district Pension Medical Examiner to the Canadian Pension Commission. If the decision is unfavourable, the advocate may then advise the applicant to request further consideration through the Commission in accordance with the application procedure as described in section on "Application Procedure". Should it be considered advisable to take the case to an Appeal Board of the Commission, the district pensions advocate is required to prepare a summary of evidence, based on the contents of all relevant documents related to the claim. It is the statutory duty of the Veterans' Bureau to prepare these summaries in all cases, including those where the applicant is being represented by a veterans organization, or by his own solicitor. A copy of the Summary of Evidence is provided to the applicant, following which he is asked to sign a Statement of Claim * in which he sets out the disability that forms the basis of his claim. The advocate then proceeds to prepare a claim for an Appeal Board. At this stage he would decide, in consultation with the applicant, on the witnesses who should be called to testify. Also, should it appear that further evidence may be available, the advocate will endeavour to secure this. When the applicant is satisfied that the claim is prepared, he notifies the Veterans' Bureau in Ottawa and awaits a visit to his area by an Appeal Board.

The advocate appears at the hearing as the applicant's counsel, and presents the case. He examines the witnesses and submits argument. The Veterans' Bureau is required by the Act to present all available evidence, including any which may be unfavourable to the case.

* Veterans' Bureau Forms--VB4, VB4A, and VB50 and VB4 Fr, VB4A Fr, and VB50 Fr.

General

The decision of an Appeal Board is final. The Act provides that if an error can be shown in the decision of an Appeal Board, by reason of evidence not having been presented or otherwise, an application may be made to a specially designated Appeal Board for leave to re-open the case before the Commission. These applications for "leave to re-open" are prepared by the District Pensions Advocate and submitted to Head Office. Appeal Board sessions to hear applications for leave to re-open are held only at Ottawa and all such applications are presented to Appeal Board by an advocate at the head office of the Veterans' Bureau, or by others who may represent the applicant including officials of the veterans organizations and solicitors.

REPRESENTATIONS AND EVIDENCE

Many of those making representations to your Committee made particular mention regarding the valuable work being performed by the Veterans' Bureau. The only general criticism concerned the responsibility of the Bureau to present all available information, including that which may be unfavourable to the case, when preparing a summary of evidence.

Canadian Corps Association: This Association recommended that District Pensions Advocates be enabled to submit cases direct to the Pension Commission in Ottawa for consideration in regard to an initial application. The procedure now in use provides that the District Pensions Advocate submits his case to the local Pension Medical Examiner for any further investigation which may be necessary, prior to transmission to the Commission.

The Canadian Corps Association recommended also that District Pensions Advocates be empowered to recommend to an applicant that no action be taken if it appeared, in the judgment of the advocate, that there was no basis for a claim for pension. Should the applicant not accept the advocate's opinion, the advocate would then forward the application in the normal manner.

The Association made a further recommendation to the effect that District Pensions Advocates be used as " temporary Commissioners" in districts other than their own in which they usually were employed as a means of providing additional personnel for Appeal Boards of the Commission.

A fourth recommendation was to the effect that District Pensions Advocates be authorized to report to the Chairman of the Canadian Pension Commission on the conduct of Commissioners at Appeal Boards, where the advocate considered that the Appeal Board had not been conducted in an appropriate manner.

Representations and Evidence

Royal Canadian Legion: This organization suggested that the statutory duty imposed upon the Bureau to place before an Appeal Board all available evidence destroyed the "lawyer-client" relationship in the Bureau's representation of an applicant. The Legion brief stated on this point: 1

To us it appears that an advocate is one who pleads on behalf of another. We assume that the relationship between the two should be that of lawyer and client. Communications between them should be of a confidential nature and the advocate should always be working in the best interests of the client, i.e. - an applicant under the Pension Act. This assumption would appear to be borne out in a statement by the Chief Pensions Advocate when he appeared before the Standing Committee on Veterans Affairs on November 28th, 1963. He stated (in part)

The bureau endeavours to give pension applicants free of all charge exactly the same kind of service as litigants would have the right to demand of a law firm representing them in civil litigation.

It is the policy of the Bureau that the District Pensions Advocate, who is in direct contact with the applicant, is responsible for the preparation and presentation of the claim throughout. The head office staff is available to advise and assist him.

This lawyer-client relationship cannot, in fact, exist because of the statutory duties imposed on the Bureau, as explained in these further excerpts from the evidence of the Chief Pensions Advocate:

.....As the decision of an Appeal Board is a final one, the Advocate is required to take every possible care that all available evidence is placed before the Board. At these hearings the Commission is not represented by counsel so the Bureau recognizes the duty to the Commission to make full disclosure of all relevant evidence in its possession.

and:

It is perfectly correct that the Veterans' Bureau owes a duty to make full disclosure of all available evidence. This duty arises out of the statutory duty imposed upon the Veterans' Bureau by the Pension Act to "prepare a summary of all available evidence relating to the claim".

Representations and Evidence

The Legion does not dispute the statutory requirements with respect to the preparation of the documentation by the Veterans' Bureau. We do feel, however, that a procedure which requires a client's advocate to present all evidence, including that which is unfavourable to his claim, is contrary to all legal ethics.

We suggest that evidence obtained by advocates which is adverse to the claim, should be placed in a confidential file and should not form part of the documentation. Opinions obtained, however, by the Commission - be they favourable or adverse - must, of course, be included in the documentation prepared by the Veterans' Bureau.

We would like to make it clear to the Committee that in raising this point we are not making a general criticism of the Veterans' Bureau. We pay tribute to the work they do on behalf of thousands of applicants and we appreciate the co-operation we receive from them at all times in our work.

In explanation of this point, Mr. D. M. Thompson, Dominion Secretary of the Legion, gave the opinion that the Veterans' Bureau should not be compelled to place unfavourable evidence or opinion before an Appeal Board. He agreed that the Act required the Bureau to prepare a summary of all evidence, but he questioned whether this requirement was a proper one.

Mr. Thompson commented that the Pension Commission was empowered to make its own investigation, in accordance with Sections 59(1) and 60(1) wherein it was provided that the Commission was required to "collect such relevant information, if any, as may be available in the records of any Department of the Government of Canada, and make, through its medical and other officers such enquiry as appears advisable into the facts upon which the application is based."

Mr. Thompson stated, further to this point, that the Commission was "quite capable of finding the other side of the case". He cited several instances ² where the Commission had instructed the district Pensions Medical Examiner to cause an investigation to be made in an attempt to

Representations and Evidence

obtain information which would establish that the claim could not be approved. Mr. Thompson gave the opinion that there was no requirement for Commission counsel at Appeal Boards, in the following words: ³

We believe it already exists and the work is going on and we feel that there is no need for counsel for the Commission; that it should be possible for the Commission to operate on the evidence that they get through their own staff, plus that submitted by the Veterans' Bureau, and make their decision on that evidence.

Mr. Jack McIntosh, M. P.: Mr. McIntosh expressed some doubt as to whether the Pensions Advocate was a "free agent". He suggested: ⁴

Well, if he is fighting the case on behalf of the veteran I feel that he should be completely divorced from this "club" of the Pension Commission and he should be in no way influenced by the Pension Commission. And he should be just as powerful as the Chairman of the Pension Commission.

I feel that under the present set-up he feels that he is subject to a senior authority in the Commission, where he cannot possible put across his views in the manner in which he wishes without fear, if they are adverse, of being reprimanded by someone higher up than him - possibly the Chairman of the Pension Commission.

Now, I do not know what control, if any, the Pension Commission has, but I have reason to believe that the Pension Advocates are dictated to by a superior authority, which I feel that they should not be.

If you want concrete evidence of that, I can produce a letter where a pension advocate just recently, within the last ten days, wrote me and said that any further correspondence or any requests of mine would not be directed to the Pensions Advocate but to the Deputy Minister or to the Secretary of the Department.

Mr. H. W. HERRIDGE, M. P.: Mr. Herridge commended the Veterans' Bureau in the following terms: ⁵

Representations and Evidence

Now, as far as the representations on the part of the veterans advocate, my experience has been, and I'm speaking of my knowledge of a large number of veterans in their correspondence, I think they have done a good job. I only received a letter the other day in which a man was delighted with the efforts of the Veterans Advocate when he had gone to present a case before the Appeal Board, you see. This has been my personal experience over a period of twenty years.

Mr. Herridge, in discussing the matter of the Veterans' Bureau providing information for and against the claim, stated that he would not change the existing system.

Mr. Rene Emard, M.P.: Mr. Emard suggested that the Veterans' Bureau should be required to bring forward only information which is considered helpful to the applicant's case and should be established under control of an independent board. In a prepared brief he stated:⁶

Although I have not had a great deal of experience with the Veterans' Bureau, I am given to understand that this is an agency of the Department of Veterans Affairs which is charged with the responsibility of handling pension appeals on behalf of an applicant who has been turned down by the Pension Commission. I am given to understand further that this agency is performing a good service, but the restrictions under which it must operate do not give the veteran the service to which he is entitled.

I make reference to two specific points as follows:

- (a) the Veterans' Bureau is required to place all available evidence before the Commission, and
- (b) the Veterans' Bureau is a branch of the Department of Veterans Affairs and is thus bound by Departmental regulations and control.

It seems rather shocking that the Government should set up an agency which is staffed by personnel who are called "Veterans' Advocates" and at the same time these advocates are charged with the responsibility to reveal all information including that which may be prejudicial to the veteran's case.

Representations and Evidence

An advocate in the true sence of this term should be required to submit only that information which would assist the veteran. Surely it should be the responsibility of the Pension Commission to bring forward any information which would weigh against the veteran. I cannot think that the veteran could have full confidence in his "Advocate" if he knew that such "Advocate" was responsible to reveal facts to the Commission which may be harmful to the man's case. With reference to my second point, I feel that some consideration should be given to the position of this Veterans' Bureau as an agency of the Government. In labour circles a parallel might be where a shop steward was engaged by management to handle complaints for the employee against the employer. One can readily imagine that the employee would have very little faith or confidence in such shop steward. At the same time, we have a situation here where an agency under direct control of the Government is charged with the responsibility of fighting the veteran's case against the Pension Commission.

In this respect there are two suggestions which come to mind as follows:

- (a) The Veterans' Bureau should be required to bring forward only that information which is considered to be helpful to the man's case; and
- (b) The Veterans' Bureau should remain as a branch of the Government but should be under the control of an independent board made up of representatives of the Government and veterans organizations. This independent board could lay down the policies for the Veterans' Bureau. This would do away with the criticism that the Veterans' Bureau was in fact, under direct control of the Minister or his Department.

Canadian Pension Commission: Mr. T. D. Anderson, Chairman of the Canadian Pension Commission, in his appearance before your Committee under date of Monday, March 21st, 1966, provided information relative to the stand taken by the Legion in regard to the Veterans' Bureau role. He said:⁷

The Legion's attitude, as set forth under this heading, is most confusing. To my certain knowledge the Legion has, for many years, voiced strong objection to having pension claims dealt with in ordinary courts of law or under the procedures in use in ordinary courts of law. Here they appear to be advocating that court procedures be now adopted by the Pension Commission.

Representations and Evidence

The proposal outlined here is based on a completely false assumption. It is based on the assumption that the Canadian Pension Commission seeks to deny the applicant a pension, while the advocate, on the other hand, must do everything he can to obtain the pension for his client, even though he may know perfectly well that the client is not properly entitled.

Actually the Commission and the Veterans' Bureau are charged jointly with the responsibility to care fully study together all the evidence pro and con in an effort to come to a decision which is just and proper. I am more than pleased to say that this is precisely the basis upon which the Bureau and the Commission operate. It is true that the Commission, as suggested by the Legion, has a responsibility under the Act to obtain the best possible evidence on which to base a claim. To suggest as the Legion does, that the Commission alone is responsible for the production of all unfavourable evidence, is an attempt to make the Commission appear to be that type of organization which the Legion, in other parts of its brief, claims to deplore. As I say, I find this most confusing, particularly when farther on in the brief the Commission is roundly condemned again for seeking the same unfavourable evidence which the Legion here says it alone must obtain.

In conclusion, it should be pointed out that the Appeal Boards base their decisions almost entirely upon the summary of evidence and the verbal evidence from the applicant, the advocate, and witnesses who appear before them. Neither the Head Office file nor the medical precis are before the members of the Appeal Board at the time of the hearing.

In reference to the question of the Veterans' Bureau presenting evidence for and against a pension claims, Mr. J. M. Forman, a Commissioner of the Pension Commission, gave the following information, at the request of Mr. Anderson: ⁸

In 1938, when they removed pensions counsel from the Appeal Sessions in reading the evidence, I understand it was for the very reason that the applicant for a pension would not like to be in the position of being before a court where two sides argued over his head and it seemed that he got lost in the shuffle. I am not suggesting that that happened, but I understand it was felt that this man should not be put in that position, and that he should come before a group and state his case and that it would be enlarged upon by his counsel.

Representations and Evidence

I understand that the terms of reference at that time were set out very specifically, that the Bureau and the Commission were expected to be responsible for promoting a claim in the man's best interest -- I can't recall the words used; but I think it was intended that they should also be responsible so far as the state was concerned.

We are at a disadvantage, Mr. Chairman, on occasions in our work because if the man's claim has been rejected by the Commission and he is now appealing that rejection it may be that it was rejected on the basis of pre-enlistment evidence. It then becomes the responsibility of one member at least of the Board to refer to the man to learn whether or not the evidence on which his claim was rejected is correct.

I for one, have been roundly criticized for that in the past because it was said that I was the one who took the evidence in the first place in the claim, and that the man gets no opportunity to agree with or to deny the evidence on which his claim fell by the wayside in the first instance.

Frequently they are able to explain to the Board that the evidence in the summary prepared by the Bureau is not quite correct. They are able to explain adequately to the people who hear the claim, to the extent that the Commission's decision is reversed.

So when you say that it all seems to be on one side, it is, in a sense, because the members of the Appeal Board must, as I understand it, by Statute investigate to see whether or not the claim is as represented. They may seek evidence from the man; they may ask questions of the advocate; and they may, if necessary, go back to the file to see if there is something contained there which throws any light on the case -- although the Bureau, I am sure, presents all the evidence which they feel bears on the case.

Dr. W. C. Gibson: Professor, Faculty of Medicine, University of British

Columbia. In support of a recommendation that the Veterans' Bureau be

permitted to secure and pay for medical specialists' opinions, Dr. Gibson

stated, in an appearance before your Committee: 9

Now, the first thing that impressed me about these cases was that there was terribly important medical evidence in the documents that I would review, and sometimes it takes a day, as you know, sir, to go through a large file at Shaughnessy Hospital, that had never been brought out.

Representations and Evidence

This was largely because the appeals were framed by a legal man, a pensions advocate at Shaughnessy Hospital who could not possibly have any knowledge about the medical relevance of some of the material and that these men welcome someone who would take the time to go into these documents.....

I have read the explanation of Dr. Brown in his evidence, and others, so that it comes as a surprise to me that there has not been some form of assistance, of their own choosing so that they have no kickback later, to help them get in front of the Appeal Boards the actual stuff that is in their files.

We have had repeated cases of this in the limited number that I have seen in Vancouver, and I believe that the Minister, when he was in the legislature in Manitoba, was instrumental in getting a provision put in the law there that a man coming before the Compensation Board of Manitoba could get such medical assistance of his own choosing at public expense, and I think that this is something we have got to look into.

These are only a few people, medical people, who can spare this kind of time as I have been able to from a University post, but I think it is perhaps essential that this thing be looked into now with a view to giving the man X number of hours of his own physician's time, and it will take some hours not just to present evidence before the Committee - that takes a few minutes only - but the days and hours that have to go into ferreting out the material.....

If the public purse has to spend \$50 or \$100 to get this kind of help for this man, I think this money spent would save thousands of dollars probably.

Veterans Bureau: Your Committee posed a number of questions to Brigadier

P.E. Reynolds, the Chief Pensions Advocate, concerning the securing of medical opinions. He stated, in his brief submitted to your Committee, as follows: 10

The Veterans' Bureau obtains its medical opinions to support a pension claim from departmental consultants and outside practitioners. Generally speaking, no difficulty is encountered in securing these opinions.

Brigadier Reynolds stated that there was some delay in opinions received from Department of Veterans Affairs consultants. His statement was: 11

Representations and Evidence

The Consultants are, of course, exceedingly busy, and it is sometimes difficult for them to find the time to review a very lengthy file. The Veterans' Bureau considers that the co-operation it receives from the Consultants is on the whole excellent.

In reply to a question from your Committee, the Chief Pensions Advocate reported that medical opinion from specialists outside of the Department was extremely valuable in supporting pension cases.

Your Committee observed that there was no provision under which the Bureau could spend Government funds to obtain medical opinions outside of the Department. On this point, the Chief Pensions Advocate stated: ¹²

Occasionally the applicant himself pays the specialist's fee, and quite frequently the specialist on hearing all the circumstances waives his fee. There are actually very few problems encountered with reference to attitude adopted by the medical profession.

It would be of assistance however, to the Bureau, if funds were available to it to enable it to secure opinions from specialists anywhere.

On the question of providing a medical staff member for the Bureau, the Chief Pensions Advocate stated: ¹³

We are rather afraid that if we had a Medical Adviser of our own who is paid an enormous salary and he told us a case was hopeless, there was no point in asking consultants about it, we would be bound to take his advice.

We would not pursue it, whereas we feel we might be right and he would be wrong, and we think we get along quite well on the whole without one.

Also, we should say, that in places like Vancouver where the Veterans' Bureau office is right at the hospital, we are in very, very close contact with the specialists there, and that is more helpful than it would be for us to have a Medical Adviser here.

Representations and Evidence

Your Committee asked the Chief Pensions Advocate to comment on the status of the Veterans' Bureau. His reply was given in a letter under date of May 27th, 1966, and was as follows:¹⁴

I thank you for your letter of May 20, 1966 with the following question attached:

The Committee on the administration of the Pension Act which sat in 1933-34 recommended that the name of the Veterans' Bureau be changed to "Pensions Adjustment Service of Canada", and that this Adjustment Service should be under the control of a separate Commission to be appointed by the Government in consultation with veterans' organizations.

This recommendation was made because the veterans organizations considered that, because the Bureau was essentially a Departmental body, it could not give unbiased attention to the interest of the veteran.

It seems to me that this was a very important issue and I would like to ask some questions:

- (A) Does the veteran get the impression, when he is talking to your officials, that he is asking one agency of the Department to take up his case with another agency?

In actual fact the Veterans' Bureau is virtually independent, and it is not subjected to pressures or interference of any kind whatsoever.

The Bureau does everything in its power to create the impression in the mind of the applicant that it is ready, anxious and willing to give his case the same kind of attention as a litigant would expect from a practising solicitor in civil litigation. The fact remains, however, that in the minds of some unsuccessful applicants there is the lingering belief that as the Veterans' Bureau is part of the Department of Veterans Affairs and the Canadian Pension Commission is administered by this Department they are all "tarred with the same brush", and therefore unbiased, energetic presentation of a claim cannot be expected.

- (B) Do you think it would give the veteran more confidence if he could be shown that he was dealing with an agency which was not under control of the Department of Veterans Affairs?

Representations and Evidence

The Veterans' Bureau would inspire more confidence in the minds of some veterans if it were not under the control of the Department of Veterans Affairs.

- (C) There are quite a few agencies which operate under control of boards comprised at least in part, of representatives from organizations outside of the Government. The Board of Broadcast Governors is one. Do you feel that if the Veterans' Bureau were placed under the control of a board of this type it would necessarily hamper your work?

The public relations of the Veterans' Bureau would be improved if it operated under the control of a Board comprised at least in part of representatives from organizations outside of the Government. It is felt, however, that this improvement would be offset by reduced efficiency which would result in the loss of quick access to files, departmental officials and, particularly, medical consultants. It is also considered that if the Bureau operated independently it would of necessity be responsible for its own administration. This would involve advocates in administrative matters to a much greater degree than at present, and time spent in administration would be at the expense of time which should be utilized in preparing pension claims.

It is, therefore, the opinion of the Bureau that unless adequate servicing facilities were provided to ensure quick access to veterans' files and to handle routine administrative matters, loss of efficiency would outweigh the more favourable image created. Furthermore, it is believed that the Bureau's happy state of virtual independence in fact, might not be continued to the same degree if the Bureau were placed under an independent Board or Commission.

The Veterans' Bureau was asked to comment on the representations made to your Committee, to the effect that a major source of irritation among veterans was the responsibility of the Veterans' Bureau to include in the summary of evidence information which may be prejudicial to the veteran's case. In a prepared brief, the Chief Pensions Advocate replied as follows: ¹⁵

Representations and Evidence

The summary of evidence procedure was introduced into the Pension Act for the benefit of the applicant to enable him to decide what disabilities he should include in the statement of claim before he signed it. The practice has developed over the years of not only preparing a summary of evidence for the applicant, but the same document is provided to the Members of an Appeal Board for their use at the hearing.

Section 59(5) and Section 60(6) impose upon the Veterans' Bureau the duty of preparing a summary of all available evidence relating to the claim.

It is quite clear that something in the nature of a summary of evidence at an Appeal Board is required by the Members of the Appeal Board to enable them to efficiently adjudicate. The question is whether or not it should be prepared by the Veterans' Bureau or some other body.

From the view-point of efficiency it is difficult to find any fault with the present practice, but if the practice is a source of irritation to veterans it might create a better image in the eyes of the veteran public if the summary was not prepared by the applicant's representative, and the duty of preparation was assigned to some body other than the Veterans' Bureau.

Your Committee asked the Chief Pensions Advocate if he could cite instances where, because of the necessity of having to review prejudicial information, a pension case had been lost. The reply was as follows:¹⁶

There are occasions when either the applicant himself or the Veterans' Bureau secures a medical opinion which is unfavourable and this opinion is placed on file and is included in the summary of evidence. The case is eventually heard and an adverse decision is rendered. In such cases the medical opinion was sought in the first place because without a favourable medical opinion there was no evidence to support the claim, therefore the unfavourable opinion simply confirmed the loss of the case which would not have been successful if the unfavourable opinion had not been produced.

The Chief Pensions Advocate was asked if he knew of the existence of any written direction to the effect that the Veterans' Bureau was charged jointly with the Commission to study the evidence and come to a decision which was just and proper. His reply was as follows:¹⁷

Representations and Evidence

The Veterans' Bureau has no knowledge of any written direction in this regard. The Veterans' Bureau has not, of course, any jurisdiction to adjudicate. The Veterans' Bureau presents all available evidence to the Commission in a light most favourable to the applicant and leaves the matter of adjudication entirely to the Commission.

Canadian Pension Commission: Mr. T. D. Anderson, Pension Commission

Chairman, in a second appearance before your Committee under date of June 20th, 1966, spoke concerning the role of the Veterans' Bureau. The discussion was as follows: 18

Mr. Anderson: There are a few points raised in the answers to questions asked of the Chief Pensions Advocate upon which I will comment.

In a general way, I think the suggestion here, perhaps not as evident as it once was, is that the Veterans' Bureau must always attempt to establish entitlement regardless of the merit of the case, and that on the other hand, the Commission tends to deny the applicant a pension, again regardless of the merit of the case.

Mr. Justice Woods: Perhaps not as evident as it once was. Was this attitude more prevalent in the past, more evident?

Mr. Anderson: I think there is a better understanding in recent months or years, perhaps, of the relationship of the two groups. That is the point I am making there.

Mr. Justice Woods: You say the Commission tends to deny the applicant a pension again regardless of the merits of the case.

Mr. Anderson: I am not saying that is the case. I am saying that is the attitude that the Veterans' Bureau is taking....

In other words, the Veterans' Bureau tends to regard itself as the attorney for the defence while the Commission is looked upon, at least to some extent as the crown prosecutor, judge and jury.

Representations and Evidence

He (the Chief Pensions Advocate) left the impression with me, and not only from what he said here but from what the discussions I have had with the Veterans' Bureau on previous occasions that they have a responsibility to get the man a pension; that this is their first responsibility.....

Now I suggest to you that their first responsibility and our responsibility is to weigh - their responsibility is to present all the evidence and argue the case in favour of the man, if they like, but our responsibility then is to decide in justice what the man should receive, and the reason for their presentation of the evidence is to help us do that...

I cannot emphasize too strongly the need for a joint effort on the part of both Commissioners and Advocates to ensure that complete justice is done.

A lengthy discussion took place at the hearing, in which Mr. Anderson gave his further views regarding the role of Veterans' Bureau.¹⁹

These views were summarized in a letter written to your Committee by Mr. Anderson following the hearing. This letter, dated June 28th, 1966, stated:

I have been somewhat concerned that I may not have made myself quite clear in expressing my views regarding the relationship which should exist between the Pensions Advocates and the Canadian Pension Commission. Since I know that you and your colleagues are anxious to know precisely what my views are in this regard, I am taking the liberty of writing you at this time. I am also sending copies of this letter to each of your colleagues on the Committee.

Originally, the Canadian Pension Commission had the benefit of assistance from Pension Counsellors whose duty it was to ensure that the unfavourable evidence was brought to the attention of the Commission when the Pension Tribunal (now the Appeal Board) was hearing the claim. Also, these Counsellors had the right to appeal favourable claims to the Pension Appeal Court. Unfortunately, very few claims which went to the Appeal Court resulted in the payment of pension, and this gave rise to great criticism of this particular system by veterans' organizations and veterans in general. When it was abolished, both the Appeal Court and the Pension Counsellors were discontinued.

Representations and Evidence

The services of the Pension Counsellors were discontinued in the mid-thirties on the understanding that the new Pensions Advocates would present all the evidence, both pro and con and without bias one way or the other, for the consideration of the Members of the Appeal Board. There was nothing in the legislation at that time, nor is there anything in it now, which directs that the Pensions Advocate shall act for the applicant in the same manner that a lawyer acts for his client in a Court of Law. The only place in the Pension Act where it is stated that the Advocate will represent the applicant is in Section 11(7) on page 10. This section reads in part ". or in his absence represent him".

If it is indeed proper for the Advocate to emphasize only the favourable evidence before the Appeal Board and otherwise promote the veterans' claims, then it seems obvious that someone must be held responsible to present the unfavourable evidence. I believe it is a well-established fact that no judge can write a satisfactory judgment if he hears only one side of the story or even if only one side of the story is emphasized while the other is disregarded or only briefly mentioned in passing. Under the existing arrangements, there is no one to bring out or emphasize the unfavourable evidence unless the Pensions Advocate does so. I believe that both the Service Bureau personnel of the Royal Canadian Legion and the Veterans' Bureau have come to think that it is the responsibility of the members of the Appeal Board to bring out and stress the unfavourable evidence, and Sections 59(1) and 60(1) could, I suppose, be interpreted to mean something of the sort. However, it is expecting a great deal of any judge or group of judges to ask that they shall first of all produce and/or emphasize the unfavourable evidence and subsequently sit down and write a completely unbiased judgment. While I am not familiar with the operations of the Law Courts, I do not believe that any judge would ever be placed in this position. Furthermore, when one appears before an Appeal Board of the Commission as an applicant for pension knowing no more about the procedure than does the average applicant, and hears the people who are going to write the final decision on his claim ask question after question designed to stress the unfavourable evidence, it will certainly not appear to him that he is going to get justice from such judges. I suggest that if all such decisions are to be just and also appear to be just, one of two procedures must be adopted as follows:

Representations and Evidence

1. The Pensions Advocate must place before the Commission all the evidence, favourable and unfavourable without emphasis on either, so that the Commissioners are left free to reach a decision which not only is unbiased but which also appears to be unbiased.
2. If the Pensions Advocate will not or cannot meet the requirements set forth in the above procedure, then someone other than the Commissioners should be appointed and made responsible to ensure that all unfavourable evidence is presented to the Commission. Under this set of circumstances, it is assumed that the Pensions Advocates would then present only the favourable evidence. I suggest that such appointments could well be made under the provisions of Section 12 of the Pension Act.

I am, of course, aware of the fact that the veterans' organizations would in all probability oppose any such suggestion as that outlined in the above-mentioned second procedure. However, I suggest that very careful consideration should be given to the question of whether or not the applicant can be certain to get an unbiased judgment in all cases under the existing arrangement. Certainly he will never appear to get an unbiased decision so long as this procedure is continued.

HISTORY

The Royal Commission on Pensions and Re-establishment commented 1922-24
as follows in regard to assistance for an applicant under the Pension

Act: 20

Assistance Given to Applicant in Establishing His Case

The complaint is made that it has been found necessary for applicants to procure the intervention of some third person or organization in presenting their claims. There is evidence that where the claim has been taken up intelligently and aggressively by an organization, the application which had previously failed finally succeeded; but the Commission is not prepared to say that this indicates any fault on the part of the Pensions Board. The theory of the Pensions Board being an advocate of the man himself can easily be carried to far.

The Commission considers that the duty of the Board will have been fairly done if it gives to the applicant correct and clear statements as to the principles on which pensions are granted, indicates the lines along which evidence is required, and, where possible, utilizes any available staff in assisting the soldier in procuring and putting into shape this information.

In 1923 provision was made, under the Department of Soldiers Civil 1923
Re-establishment, for the appointment of Soldiers' Advisers, charged with the responsibility to assist ex-servicemen and their dependants in all claims in respect to benefit arising from service in the Armed Forces. These Soldiers' Advisers were given the responsibility to prepare applications coming before the Board of Pension Commissioners. When the Federal Appeal Board was instituted in 1923, these Soldiers' Advisers were given the duty of assisting applicants at appeal. These duties were set out in the Department of Soldiers' Civil Re-establishment Act 1923 as follows:

History

7. The Governor in Council may, on the recommendation of the Minister, appoint at such salary or remuneration as may be decided in each case, in each unit or district of the Department, an ex-member of the forces, be known as the Official Soldiers' Adviser, whose duties shall be generally to advise and assist ex-members of the forces in matters pertaining to re-establishment, treatment and pension, and to perform such other duties as may be prescribed by the Minister. 1923, c.69, s. 3.

On Monday, March 3rd, 1930, the House of Commons approved a resolution establishing a Special Committee on Pensions and Returned Soldiers' Problems. In its Fifth Report under date of May 14th, 1930, this Committee reported as follows:²¹

1930

To ensure the proper presentation of cases before the Tribunal and, so far as possible, to shorten its proceedings, it is considered desirable to provide for the re-presentation before the Tribunal not only of the applicant, but also of the public which provides the funds of which the Tribunal is empowered to dispose. The Committee accordingly suggests that authority should be given for the organization of a Veterans' Bureau staffed with pension advocates, and also for the appointment by the Pension Commission of a staff of counsel. It will be the duty of the pension advocates to prepare on behalf of the applicant the material which should be submitted to the Tribunal in support of the application, and of the Commission counsel to examine the material with a view of conceding before the Tribunal of all those points which may properly be conceded in the applicant's favour, and at the same time of directing the Tribunal's attention to any matters which appear to require its special consideration in order that it may arrive at a proper decision.

This Committee prepared a draft bill which contained the following recommendation concerning the establishment of a Veterans' Bureau.²²

Provision shall be made for the constitution of a branch of the Department to be known as the "Veterans' Bureau" which, subject to the direction of the Minister shall be administered by a chief pensions advocate who shall be assisted by such other pensions advocates and such additional staff as may be required for the proper performance of the duties of the Branch.

History

The Special Committee of representatives of the Pension Commission, 1932-33 the Department of Pensions and National Health and veterans organizations, which was appointed by Order-in-Council under date of August 4th, 1932 to investigate complaints made by veterans organizations in respect to the administration of the Pension Act, examined the administration of the Veteran' Bureau. The members of this committee filed four individual reports. The report written by Brigadier-General Alex Ross, representative of the Canadian Legion and concurred in by representatives of the Army and Navy Veterans, the Amputations Association of the Great War, and the Canadian Pensioners Association, recommended that the activities of the Veterans' Bureau be expanded. This report stated: ²³

Veterans' Bureau

I commence with this branch because, as I have already indicated, preparation, or lack of preparation, is the fundamental cause of all congestion. It has been demonstrated beyond doubt that the Board of Pension Commissioners is seriously hampered in its work by having to consider cases, not prepared or insufficiently prepared. The same thing applies to a lesser extent in the Tribunal and more particularly before the Court of Appeal. Up to August 31, 1932, the Court had given decisions on 2,445 cases, and of these 214 or more than 10 per cent had been referred back to the Tribunal for rehearing generally on the ground that the case had not been properly presented. This involves, of course, great delay, waste of effort, to say nothing of expense. I feel, therefore, that nothing can be accomplished unless we make provision for extending and strengthening the Veterans' Bureau and while some expense may be involved here I am quite satisfied that in a very short time the savings effected in other departments will more than offset the expenditure involved.

In this connection I may say that I do not think it advisable or desirable that one not connected with the administration should make distinct recommendations as to the relationship of this Bureau to the adjudicating bodies, but it seems to me that a tremendous amount of expensive time would be saved if some arrangement were made whereby applications for entitlement with respect to pension which are unsupported by relevant evidence should

History

be referred to the Bureau and prepared before submission to the Board. Every time an application comes before the Board, it has to pass through the routine of preparation for the purpose of presentation but if it does not carry with it the initial evidence necessary to secure entitlement it must inevitably be rejected. It is in evidence that many claims come back time after time without any additional relevant evidence and much time of the Board and of its staff is necessarily wasted in dealing with cases in which the Board cannot grant entitlement in the then-present state of preparation of such claims. This should not require any legislative sanction but a working arrangement whereby the Board and the Bureau would co-operate should be easy of arrangement.

It is submitted further that the idea of having all applicants approach the Board through the Bureau, and which cannot easily be procured by compulsion, might be procured without compulsion if the Bureau were separated from the Department. In the evidence before us it has been shown that the fear exists that because the Bureau is essentially a Departmental body, it will not give unbiased attention to the interest of the soldier. This has been described by one witness as a "bogey", but it is quite evident to me that the feeling does exist to a marked degree. If the soldier can be induced to approach the Board in this way, all parties agree that much time will be saved and wasted effort avoided. For that purpose, therefore:

Recommendation No. 1

I recommend that the Veterans' Bureau should be under the control of a separate Commission, the personnel of which will have to be determined by the Government in consultation with veterans organizations. This Commission would serve without remuneration and have entire control of the Bureau in so far as the appointment and discipline of the officers who are charged with the responsibility of preparing and presenting cases is concerned, together with the right of fixing the qualifications of such officers. Sub-staff to be provided by the Civil Service Commission as at present arranged.

Recommendation No. 2

That in any such reorganization provision should be made for an inspector to constantly exercise supervision over the work and preparation of cases in the District Offices of the Bureau.

History

Recommendation No. 3

That the name of this body be changed to "The Pension Adjustment Service of Canada."

Richard Myers, the representative of the Amputations Association and the Sir Arthur Pearson Association of the War Blind, filed a supplementary letter to the Minister of Pensions and National Health which referred to the Veterans' Bureau as follows: ²⁴

If provision for and insistence on adequate preparation of cases was the rule, there would be great economy of time and expense of pension adjudicating bodies.

I, therefore, wish to emphasize the necessity of complete case preparation facilities, and my belief is that this could be assured with greater certainty, particularly in the minds of the veteran, if the Veterans' Bureau, as at present constituted, was placed under voluntary independent commission jurisdiction (statutory) having no connection with the Department of Pensions and National Health, other than salary and expense appropriation. Accessibility of records would be an obvious necessity. The uniformity of Advocate office results can only be secured by the provision of a travelling official responsible for instruction and inspection. The scope of the Bureau should be enlarged to cover all claims affecting veterans' welfare and to be a personal service department for veterans at large in their dealings with the several departments.

It is considered that the Commission in the discharge of its duties would be familiar with the work of Advocates and results achieved. From their knowledge, improvements in Bureau personnel and suggestions leading to the solution of fundamental difficulties in the preparation, presentation and adjudication of claims would result. Further, they should consider suggestions emanating from veteran organizations affecting the Pension Act and administration, and recommend suitable action.

The report filed by L. P. Sherwood, a member of Pension Appeal Court, and concurred in by Brigadier-General H. F. MacDonald, member of the Pension Tribunal, made the following reference to the Veterans' Bureau: ²⁵

History

It is not unreasonable to regard the Veterans' Bureau as an essential adjunct to the adjudicating bodies. Faced with an enormous task, it appears to have made good and orderly progress and there was no evidence before the Committee of which any other inference could be drawn than that it commands the confidence of the applicants in general. Upon its continued efficiency will largely depend the satisfaction or otherwise of the individual applicant and the rapidity and expedition with which the adjudicating bodies can dispose of claims.

The Sections of the Pension Act dealing with the Veterans' Bureau were amended in 1933 in accordance with Bill 78 of the House of Commons as follows:²⁶

- 10(g)(1) There shall continue to be a branch of the Department known as the "Veterans' Bureau", which subject to the direction of the Minister, shall be administered by an officer called the Chief Pensions Advocate who shall be assisted by such other pensions advocates and such additional staff as may be required for the proper performance of the duties of the branch.
- (2) Pension advocates hereafter appointed shall, as far as may be practicable, be barristers or advocates of good standing at the bar of any of the provinces of Canada.
- (3) The pensions advocates shall be appointed under and pursuant to the provisions of the CIVIL SERVICE ACT at such salaries as the Governor in Council may prescribe.
- (4) The persons now holding the offices of chief pensions advocate and pensions advocates shall continue, during pleasure, to hold such offices.

The annotation explaining this section read as follows:²⁷

The amended portions of Section 10 (g) are underlined above. The annotations which accompanied the new Section stated that Section 10 (g) (2) which provided that Pensions Advocates should be Barristers, so far as may be practicable, and should be placed under the Civil Service Commission were made in accordance with the reports of the Committee (1932-33 Investigating Committee) on the administration of the Pension Act.

History

A report on the operation of the Veterans' Bureau was given to the Special Committee on Pensions and Returned Soldiers Problems by Col. C. B. Topp, Chief Pensions Advocate, under date of May 12th, 1936, as follows: ²⁸

1936

For many years perhaps the principal weakness in the administration of the Pension Act was absence of proper provision for preparation of the case in its earliest stages. This situation was met by the establishment in 1930 of the Veterans' Bureau. Since that time the Bureau has been the foundation of the judicial administration of the Act and has borne the brunt of administrative work with respect to receipt and disposal of pension claims.

There are 25 pension advocates operating in 18 local offices, directed from a head office at Ottawa, where there are five advocates. Of these 30 advocates 16 are laymen and 14 are lawyers. Of the laymen all but five had years of experience in work under the Pension Act prior to their appointment as advocates. Of the lawyers one had previous experience. The advocates now on the staff have all had five years' experience -- 12 of them have had upwards of 14 years' experience. My advocates are a group of loyal, able and thoroughly efficient public servants whose work has had altogether too little recognition. To them is due in large measure not only the fact that many applications are granted but also the fact that in upwards of 50 per cent of the claims not granted, the decision of the Commission is accepted and the expense of a local hearing thus avoided. The suggestion which appears several times in the record of evidence heard by the Committee that the advocates' work is chiefly concerned with presenting cases before quorums and the Appeal Court is absolutely contrary to the fact. Witnesses from the Commission will, I am sure, tell the Committee that at least 90 per cent of all entitlement applications are prepared by the Veterans' Bureau before initial consideration. In short, this is the most important part of our work.

This Parliamentary Committee, in its report to the House of Commons under date of June 10th, 1936, made the following recommendation: ²⁹

The procedure respecting application for pension has been re-written. Under it, the applicant will be able to present his claim twice only to the Commission. Before the second submission, he will be furnished with a summary of all available evidence by the Veterans' Bureau. All disabilities in respect of which he desires to claim pension must be before the Commission at the second hearing.

HISTORY

The amendments submitted in the House of Commons Bill 26 concerning the Veterans' Bureau in 1936 were as follows:

52(1) Whenever any application for pension is not granted, the Commission shall promptly notify the applicant, in writing, of its decision, stating fully the grounds therefor; and shall inform such applicant that he may within the period of ninety days after the date of such notification, inform the Commission of his intention to renew his application with or without additional evidence, in person or by or with a representative, before a quorum of the Commission sitting at Ottawa or elsewhere in Canada and further, that he will be entitled in either case, to the assistance of the Veterans' Bureau in preparing his claim.

52(2) If the applicant signifies his intention within the period aforesaid of renewing his application with or without additional evidence before a quorum of the Commission the Chief Pensions Advocate shall assist him in preparing such additional evidence and arrange for the presentation of the application before such quorum sitting at Ottawa or elsewhere in Canada, either by himself or by a pensions advocate; if the applicant so elects he may also have the same presented by some other person at his own expense.

These sections set forth the procedure under which the Veterans' Bureau would assist the applicant in the preparation of his claim, including the requirement of the Bureau to prepare a summary of "all available evidence". The explanatory note which accompanied those sections stated as follows: 30

That he will be entitled in either case to the assistance of the Veterans' Bureau in preparing his claim; and

The Chief Pensions Advocate shall assist him in preparing such additional evidence and arrange for the presentation of the application before the Commission or such quorum sitting in Ottawa or elsewhere in Canada, either by himself or by a Pensions Advocate; if the applicant so elects he may also have the same presented by some other person at his own expense.

Your Committee notes that there was no reference, in the annotation, to the meaning of the words in the Act: "prepare a summary of all available evidence relating to the claim".

History

The responsibilities of the Veterans' Bureau to assist in the preparation of applications arising out of service in World War I were continued in the procedural sections of the Act dealing with World War II. Other than this legislation dealing with World War II, there has been no basic change in the legislation dealing with the Veterans' Bureau since the end of World War II.

1943-46

COMMITTEE RECOMMENDATIONS

- (39) That Section 11(6), which states that the Bureau shall be responsible to advise pensioners and applicants, be clarified to the effect that the Bureau should provide a "general counselling service" for pensioners and applicants in respect of all matters affecting pension. Counselling Service
- (40) That, where the services of the Bureau have been requested, and it appears in the judgment of a District Pension Advocate that there is no basis upon which an application could succeed, the Advocate accept the responsibility to advise the applicant accordingly; but should the applicant wish to proceed with the application, the Advocate would submit the application in its most favourable light. Pension Advocate To Advise Applicant if Claim Unlikely to Succeed
- (41) That the Chief Pension Advocate undertake a survey to determine whether the Bureau should be staffed entirely by barristers, or, alternatively, whether personnel with no legal training can be adapted to the role of pension advocate, and that this matter be the subject of a report to the appropriate Minister within twelve months of the publication of this report. Use Of Barristers As Advocate
- (42) That Government funds be provided through which the Bureau could pay for medical opinion where such is required in connection with an application being handled by the Bureau. Funds For Medical Opinions

Committee Recommendations

- (Q3) That authority for the Veterans' Bureau be established under a separate act of Parliament and the Bureau be required to report directly to the Minister; and it shall be named the Bureau of Pension Advocates to be operated as an independent agency charged with the sole responsibility to assist applicants under the Pension Act. Veterans' Bureau under Separate Act To Be Called "Bureau of Pension Advocates"
- (Q4) That the Veterans' Bureau be relieved of the necessity to provide information to the office of the Minister of Veterans Affairs or to other departmental officials in respect of individual pension cases. Veterans' Bureau Not To Furnish Information on Individual Cases
- (Q5) That the Act be amended to provide the following changes in procedure in regard to Veterans' Bureau: Summary of Evidence Discontinued
- (a) The responsibility of the Bureau to prepare a summary of evidence be discontinued.
 - (b) Where its services have been requested, the Bureau undertake responsibility to prepare a submission, outlining the basis of an applicant's claim, as follows: Bureau to Prepare Submission
 - (i) First application for personnel while serving in, or in the process of release from the Armed Forces.
 - (ii) In all applications at the "second application" or subsequent stages including "renewal applications", "entitlement board", "personal appearance under Section 7(3)", and "Pension Appeal Boards".
 - (c) Where a veteran has requested the services of a representative other than the Veterans' Bureau in connection with an application under the Pension Act, the Bureau should undertake responsibility to assist in the provision, to that representative, of such information as he may require in the presentation of the applicant's claim. Where necessary, this information could include copies of the summary of evidence and medical precis prepared by the Pension Commission. Bureau to Provide Information for Other Representatives

Committee Recommendations

- (46) That the role of the pension advocate, in representing an Pension Advocate
applicant for pension, be clearly delineated as that of To Represent
Applicant Only
pleading the veteran's case.
- (47) The Bureau of Pension Advocates be recognized as an integral Adequate Funds
and Staff
part of the administration of pensions and be provided with
sufficient funds and staff to facilitate its operation.

COMMENTGENERAL

Your Committee is of the view that a strong and well-operated Pensions Advocate Branch is essential in an effective administration of pension legislation for veterans, members of the Armed Forces, and their dependants. It is desirable that this Branch be permitted to maintain a "lawyer-client" relationship and that, in so far as possible, the Branch operate as a separate and independent agency, charged solely with the responsibility of serving the pension applicant.

It is the view of your Committee that, by-and-large, the Veterans' Bureau has interpreted its role in these terms. It is apparent that some provisions of the Act have made it impossible for the Bureau to completely fill this role. Also, its relationship to the Pension Commission and the Department of Veterans Affairs has been such as to make it difficult for the Bureau to reflect such an image.

Separate Act and Re-naming

In order to give effect to the Bureau's identity as an independent agency, your Committee has recommended that the authority for its existence be removed from the Pension Act, and placed in separate legislation. The inclusion of this authority as part of the Pension Act has led to misunderstanding as to the role of the Veterans' Bureau, and its relationship with the Pension Commission. Also, the wording of Section 11(1) that "there shall continue to be a branch of the Department known as the Veterans' Bureau" has led to further misunderstanding as to the basis of operation between the Bureau and the office of the Minister of Veterans Affairs, and the Department of Veterans Affairs generally.

Comment

The image conveyed to many veterans seems to be that the Bureau is part of the Pension Commission. An unsuccessful applicant finds it all too easy to believe that the handling of his case has been adversely affected by this relationship. Your Committee considers that the establishment of the Bureau under a separate Act would defeat any suggestion that it is part of either the Commission or the Department of Veterans Affairs.

The placing of the Bureau directly under the Minister would give it new status as an independent body dedicated to the cause of the applicant. Your Committee does not see the adoption of this recommendation as creating any disruption in administration.

This recommendation suggests also that the Bureau be re-named the "Bureau of Pension Advocates". The existing name of "Veterans' Bureau" is no longer appropriate, in that an important part of its work is the handling of pension claims on behalf of members of the Regular Forces. The volume of the Bureau's work in this field will, in the normal course of events, increase in proportion to the work being carried out on behalf of veterans.

Responsibility to the Office of the Minister of Veterans Affairs

Your Committee noted that the staff of the Veterans' Bureau was used, upon occasion, to prepare information for the office of the Minister in regard to pension cases. This practice has been followed for many years. Notwithstanding, there seems some question as to whether this is a proper role for the Veterans' Bureau, bearing in mind that the Bureau's first responsibility is to represent the veteran. In the instance where an enquiry is made of the Minister's office concerning an unfavourable decision

Comment

of the Pension Commission, the Bureau would be placed in the position of having to explain that decision. There are cases in point.*

In your Committee's view the Veterans' Bureau should not be used for the purpose of providing information to the Minister's office in respect of pension cases. If the Bureau is to represent the applicant effectively, such information should come from other sources.

Changes in Procedure

Your Committee considers that the Bureau should be relieved of the responsibility of preparing summaries of evidence. The requirement upon the Bureau to provide a summary of "all available evidence"³¹ has led to criticism that the Bureau must necessarily play a dual role in that it must represent the veteran, and at the same time present evidence which may be prejudicial to his case.

Your Committee's recommendation is that the summary of evidence be replaced by:

- (1) A summary of evidence prepared by the Pension Commission.
- (2) A medical precis to be prepared by the Pension Commission, providing all medical data which is pertinent to the case, as known to the Pension Commission; and **
- (3) A submission or brief from the Pension Advocate, stating the information and argument in support of the claim.

Your Committee has recommended elsewhere that the procedure of the proposed Entitlement Board (at present Appeal Board) be revised, so that members of an Entitlement Board would have available the file, together with the summary of evidence and the medical precis.

* See Committee Case File No. 5

** See Recommendation No. 15 (d), Chapter 5, page 128 hereof.

Comment

These documents could be studied prior to a hearing so that the members of an Entitlement Board would be fully conversant with the previous adjudications, and could then give consideration to the new submission being made by the pension advocate.

Where a veteran has requested assistance from a representative other than a pensions advocate, the Bureau would accept responsibility to provide that representative with all available information on the case, and would secure copies of the summary of evidence and medical precis from the Commission, for transmission to the veteran's representative.

General Counselling Service

Your Committee took cognizance of the requirement in Section 11(6) that the Veterans' Bureau shall advise pensioners and applicants in regard to provisions of the Act.

Your Committee gained the impression that the responsibility of the Veterans' Bureau under this section to provide what might be called "general counselling" for applicants was not generally understood by veterans organizations or the public. In general law practice, it is the task of the lawyer to provide legal advice. In like manner, the Bureau of Pension Advocates, in following out the principle of the "lawyer-client" relationship, should be in the position to provide all forms of advice to a potential applicant in respect of the Pension Act. This advice may well be to the effect that the applicant could qualify only if certain specific evidence could be obtained, or if certain circumstances could be proved. Although your Committee realizes the difficulties inherent in any attempt by a pension advocate to counsel against the submission of a claim, it is still the advocate's responsibility to provide the best possible advice.

Comment

Therefore, he should feel free to counsel against the submission of the claim, if, in his judgement, this is the only reasonable advice he can give. Naturally, should the applicant wish to proceed with a claim, the advocate should accept the responsibility of advancing the claim with the same dedication as in any other case.

One reason for the recommendation by your Committee concerning the clarification of the role of the Bureau to provide "general counselling service" is a budgetary one. All too often the work of an agency is measured in terms of its successful cases. This type of evaluation is not applicable in the case of the Veterans' Bureau, for the reason that its advocates must not only present pension claims, but should, as well, act in an advisory capacity. This includes the provision of effective service in the best tradition of the lawyer-client relationship. In this respect your Committee points out that, in providing finances and personnel for the operation of the Bureau, its responsibility to render this fully-rounded service must be taken into account.

Advocates with Legal Training

Your Committee noted the comment of the Royal Commission on Government Organization which follows:³²

Within the Department of Veterans Affairs, approximately one-half of the fifty-odd lawyers are employed on the regular legal solicitor work for the benefit of the Crown; the remainder, in the Veterans' Bureau (known as Pension Advocates), are primarily concerned with defending the interests of veterans.

Comment

Your Commissioners recommend that the departmental solicitor group be incorporated with the proposed integrated legal service under Justice. The Pension Advocates should not, however, form part of the integrated service. A large portion of the functions of Pensions Advocates is essentially welfare work which could be performed equally well by laymen.

Where this special type of assistance is rendered to veterans by non-lawyers, it would be desirable to permit the latter access to departmental solicitors. In such cases, the duty of the departmental solicitor should be limited to an interpretation of the law, and any identification of the solicitor with the merits of a particular claim should be avoided.

In the view of your Committee the task of advocacy in respect of claims under the Pension Act is one in which legal training, if not essential, is certainly most valuable. Advocates who are barristers bring to the preparation of their cases, the skills and knowledge gained in the practice of law. Such advocates are undoubtedly in an advantageous position, by reason of their training in the analysis of evidence and presentation of argument. Moreover, barristers would have a certain standing before an Entitlement Board or other adjudicating body which could be achieved by persons without legal training only on the basis of long experience.

Your Committee believes that, in keeping with the desire to furnish the veteran with the best possible service, the use of barristers as advocates is fully justified. Your Committee is aware, at the same time, that a number of very excellent pension advocates who have not had legal training have given, and are continuing to give, excellent service to the veteran. If, however, legal training is not in all instances an essential requirement for a pension advocate, in the opinion of your Committee, it is certainly desirable.

Comment

Another question is whether it is feasible to attempt to staff the Bureau entirely with legally-trained advocates. Your Committee envisages that some difficulty may be encountered in obtaining personnel of required calibre with legal training, within the salary range which is realistic for this type of work. As your Committee has said earlier, the country's responsibility to ensure effective service for pension applicants is obvious. The problem of staffing the Bureau with lawyers may well depend on whether it is possible to obtain lawyers for this type of work in what might be considered a reasonable salary range.

It is evident that the work of the Bureau is a very specialized form of advocacy which would not require a wide range of knowledge of law. However, a basic knowledge of law and advocacy will make for more effective presentations. Your Committee considers that the Chief Pensions Advocate should be requested to undertake a study of this problem, with the view to making recommendations to you in regard to the qualifications for pension advocates.

Medical Advice

Your Committee considers that, in order to do its job properly, the Bureau should be empowered to expend Government funds to pay for opinions of medical specialists where such opinions are required in connection with a pension case. The Pension Commission is authorized to provide payment for such opinions. It is the view of your Committee that that same facility should be available to the Bureau, where the Chief Pension Advocate considers that an opinion from an independent specialist would assist in presentation of a claim.

Comment

Under the existing practice, the Veterans' Bureau can obtain opinions from medical consultants who are employed by the Department of Veterans Affairs. In many instances, these consultants have given a previous opinion to the Pension Commission on the same case. This practice has evident drawbacks, and although your Committee would not wish to see this practice discontinued, the Bureau should be entitled also, on its own authority, to obtain opinions from outside medical specialists.

Role of Pensions Advocate

Your Committee noted the view of Mr. T. D. Anderson, Chairman of the Pension Commission, to the effect that Pensions Advocates were required to present a case without bias. In his letter of June 28th, 1966, he stated: *

The services of the Pension Counsellors were discontinued in the mid-thirties on the understanding that the new Pension Advocates would present all the evidence, both pro and con and without bias one way or the other for the consideration of the Appeal Board. There was nothing in the legislation at that time, nor is there anything in it now, which directs that the Pension Advocate shall act for the applicant in the same manner that a lawyer acts for his client in the court of law.

So far as your Committee has been able to determine, there was no legislative authority for the discontinuation of the services of pension counsel in the mid-thirties, or for the understanding, cited in Mr. Anderson's letter, to the effect that Pension Advocates would be required to present all of the evidence, without bias, before an Appeal Board.

The relevant amendments to the Act were submitted in Bill 26, assented to under date of June 12th, 1936.**

* See page 382 hereof.

** See page 391 hereof.

Comment

The annotation stated that the Chief Pension Advocate would assist the veteran in the presentation of his application. No mention was made of any requirement upon the Pensions Advocate to take over the responsibility of counsel for the Pension Commission.

This touches upon a major problem in the operation of the Veterans' Bureau. The need to define the role of the Pensions Advocate solely as that of representing the applicant has been discussed and your Committee has made its recommendation accordingly.

Funds for Operation

Your Committee has attempted, throughout this section, to stress the importance of the role of the Bureau in the administration of the Pension Act. The recommendations made herein call for some expansion of its activities, particularly in regard to the preparation of submissions, its assistance to veterans organizations and others representing the applicant, and the provision of counselling service. Also, your Committee's recommendations concerning the establishment of an Appeal Board and expanded personal appearances of Section 7(3) of the Act, together with the recommendation that the Bureau establish liaison offices at Canadian Forces Headquarters, would require a commensurate increase in the Bureau's facilities. It will be essential to the successful administration of the Pension Act that the Bureau be given sufficient funds and staff to carry out these expanded responsibilities.

Conclusion

Your Committee wishes to commend the Bureau and its staff for an excellent performance of duties, as noted in the examination of the work carried out under the Pension Act. The recommendations made by your Committee are not intended to reflect adversely on the Bureau, and they are made with a view either to regularizing some of the practices now followed by the Bureau in assisting applicants, or to facilitating its work.

VETERANS' BUREAUREFERENCES

1. Proceedings of Committee Sessions, Volume III, Page L-94.
2. Ibid, Volume III, Pages L-98 and 99.
3. Ibid, Volume III, Page L-100.
4. Ibid, Volume IV, Page M-25.
5. Ibid, Volume V, Page S-14.
6. Ibid, Volume V, Page Z-9.
7. Ibid, Volume IV, Page R-33.
8. Ibid, Volume IV, Page R-34.
9. Ibid, Volume VI, Page JJ-3.
10. Ibid, Volume VI, Page KK-104.
11. Ibid, Volume VI, Page KK-104.
12. Ibid, Volume VI, Page KK-105.
13. Ibid, Volume VI, Page KK-146.
14. Letter from Chief Pensions Advocate to this Committee, dated May 27th, 1966.
15. Proceedings of Committee Sessions, Volume VI, Page KK-105.
16. Ibid, Volume VI, Page KK-106.
17. Ibid, Volume VI, Page KK-117.
18. Ibid, Volume VII, Page NN-9.
19. Ibid, Volume VII, Page NN-10.
20. Report, Royal Commission on Pensions and Re-establishment 1922-24, Sessional Paper 154, Page 118.
21. Report, Special Parliamentary Committee on Pensions and Returned Soldiers' Problems, 1930, Page IX.
22. Ibid, Page XII, 10(K).
23. Report, Committee Appointed to Investigate into the Administration of the Pension Act, 1932-33, Page 33.
24. Ibid, Page 44.
25. Ibid, Page 54.
26. Bill 78, as passed by the House of Commons, May 12th, 1933, Page 7.
27. Ibid, Page 7a.
28. Fourth Report, Special Parliamentary Committee on Pensions and Returned Soldiers' Problems, June 10th, 1936, Page VI.
29. Proceedings, Special Parliamentary Committee on Pensions and Returned Soldiers' Problems, May 12th, 1936, Page 400.
30. Bill 26, as passed by the House of Commons, June 12th, 1936, Page 12.
31. Sections 59(4)(5) and 60 (6) of the Pension Act.
32. Report, Royal Commission on Government Organization, Volume II, Page 418.

CHAPTER 11
ROUTINE DECISIONS
DISCRETIONARY BENEFITS

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GENERAL

The Claims and Review Branch is responsible for the processing of non-medical claims prior to presentation to commissioners for decision. In addition, the Chief of the Claims and Review Branch acts as an adviser to the Commission on matters of a non-medical nature affecting pension. A list of the more important types of claims processed by the Claims and Review Branch follows:

1. Dependent parents or foster parents
2. Former members of British and Allied Forces
3. Widows
4. Re-married widows
5. Unpaid balances
6. Administration of pension
7. Division of pension
8. Last illness and burial grants
9. Additional pension for dependants in irregular unions.
10. Extension for children for educational purposes
11. Compassionate awards.
12. Awards involving payment of legal damages or Workmen's Compensation
13. Retroactive awards
14. Retroactive payments
15. Write-off where recovery of overpayment cannot be made.

Generally, non-medical claims are referred to the Claims and Review Branch from the district offices of the Pension Commission. The documentation from the district office includes the application, investigation reports and supporting statements. The Claims and Review Branch at head office reviews the claim and determines if further investigation is required. Additional information, when necessary, is obtained through the Commission's district offices, the Department of Veterans Affairs, various levels of government, private agencies, veterans organizations and employers, or from the applicant, his dependants and other private citizens.

General

When the pertinent information is assembled, it is reviewed by the officers of the Claims and Review Branch, who have an expert knowledge of the Act and policies of the Pension Commission. It is then summarized in a submission to the commissioners for decision, with a recommendation including comments concerning applicable policy or practice.

It is the responsibility of the Claims and Review Branch to review decisions made by the Commissioners to ensure that such are not contrary to the Act or policy.

This Branch has a relatively heavy work load. A break-down of cases handled by the Claims and Review Branch for the week of June 13th, to 17th, 1966, is given hereunder:

Approximate Breakdown of workload for
Claims Branch, C.P.C. for
Week of June 13-17th, 1966

<u>Nature of Cases</u>	<u>Review Only</u>	<u>Decision by Commissioners</u>	<u>Total Cases</u>
Dependent Parents	144	104	248
Extension for children	336	256	592
Unpaid Balance of pension Funeral Grants	208	192	400
Widows Pensions Retroactive Awards	60	53	113
Pension Administration Reviews	426		426
Supplementary Pension Compassionate Pension Widows Pensions	93	17	110
Administration of Pension	162	88	250
Division of Pension	148	88	236
Additional pension (wives and children)	64	33	97

General

Overpayments	10	45	55
Foreign payments	62	26	88
	<hr/>	<hr/>	<hr/>
Total	1713	902	2615

These statistics do not include applications for reinstatement of pension for child undergoing course of instruction, where pension has been suspended during the summer holidays. The reinstatements for the last three years were as follows:

1963/64	-	21,874
1964/65	-	30,237
1965/66	-	33,928

REPRESENTATIONS AND EVIDENCE

Delegations from veterans organizations appearing before your Committee made no specific observation regarding the Claims and Review Branch. Many of the representations made in other areas, however, included some reference to the activities of the Claims and Review Branch. In particular, your Committee heard some criticism regarding delays. Also, there were complaints that the Commission did not make sufficient use of the procedure under Section 7(3) of the Act which permits a pensioner to appear before one or more Commissioners in respect of a complaint in regard to pension.²

The commissioners are required, under the Act and existing policies, to devote a great deal of time to the adjudication of claims processed through the Claims and Review Branch. The current annual work load is estimated at some 16,200 entitlement cases referred from the Medical Advisory Branch, together with an estimated 10,865 cases referred from the Claims and Review Branch.

It seems evident that if some of the existing responsibilities of the commissioners to make decisions in more routine matters could be taken over by the Claims and Review Branch, some delays would be eliminated. The commissioners would also be free to devote more time to cases requiring adjudication following personal appearances under Section 7(3).

Mr. F.G. Whitall, Chief, Claims and Review Branch, Canadian Pension Commission: Mr. Whitall provided information in regard to capability of the administrative officers in the districts as follows:³

Representations and Evidence

The administrative officer (pensions) in each of our district offices, who is actually the office manager for the pension medical examiner, is responsible for quality control, being responsible for ensuring that the time requirement is met and also to ensure that each report, document, etc., meets the requirements of the Commission. The district officers are in fact seeing to it that enough factual information is submitted through Claims and Review Branch, to enable the Commission to render a proper decision.

These people in the districts are well-trained individuals. The bulk of our investigatory work is done by the district welfare staff and the Pension Commission staff, and there is a formal training programme to train these people in the requirements of our work and the work they carry on for the Department, for War Veterans Allowance, for treatment, investigation and this sort of thing, and grants of any sort.

Mr. Whitall explained that a high percentage of the claims processed through the Claims and Review Branch were routine. The following discussion took place: ⁴

Mr. Whitall: These are very routine, sir.

Col. Nantel: Would you say that 90% are routine?

Mr. Whitall: Yes, and perhaps a little higher than 90%; but it is the 5% or 6% which causes all the grief and work.

Mr. Whitall explained that the Pension Commission had delegated some authority to the Claims and Review Branch in regard to the approval of additional pension for dependants, once entitlement had been granted for the pensioner, and in connection with the recovery of overpayments up to \$50. His explanation was as follows: ⁵

Because of pressure of other duties, the Commission, as an expedient, has delegated specific authority to certain members of Claims and Review Branch. This included the authority for approval for payment of the initial application for dependents. This authority extends only to the straightforward application for pension for wife and children.

Representations and Evidence

I mean to say, if an application comes in and the man declares that he is legally married and his wife is legally married and the children are legitimate children our staff have the authority to, and do, authorize payment. If they are not competent to look into it... that is, to determine the legality of the man's present marriage -- then it must go through Pension Counsel to the Commission for decision.....

Authority was also delegated for recovery of overpayment up to \$50.

In regard to the approval of second and subsequent extensions of pensions for educational purposes on behalf of children, Mr. Whitall stated:

Authority has also been delegated to the Claims Branch staff to approve second and subsequent extension of pensions for educational purposes on behalf of children under Section 26(1)(b).

Mr. W. P. Power and Mr. A.D. Decker, Commissioners: These Commissioners appeared before your Committee voluntarily to provide information from the viewpoint of individual Commissioners. Mr. Power expressed the opinion that the Commissioners were required to do a great deal of "formal signing" which was unnecessary. His statement follows: ⁷

We have other types of work, such as the signing of decisions that have already been made. This is really merely the formal signing. We also have the signing of educational pensions or pensions for children who are requesting an extension of pension because they are taking additional education.

These two areas are, in my view, a waste of time. The Commissioner is wasting his time doing this, because this is purely routine signing. It has been said that if we do not sign these decisions, then we are waiving our right to do so..... Some solution I think could be achieved which would relieve us of this problem and permit us to spend more time on what I feel is the more important part of our work.

Mr. Power suggested that decisions in regard to burial grants required the Commission to exercise discretionary powers and formed an important part of their work.

Representations and Evidence

He suggested also that the Commissioners should deal with recoveries and decisions concerning the decision of pension between a pensioner and a dependant. In commenting as to whether these decisions were of a routine nature, he stated:⁸

I suppose you could call them routine in the sense that they keep coming back, but other than that each individual case differs and I think most of them are worthy of an individual decision.

Mr. Decker stated that it would be difficult to decide which cases should be handled by the Commissioners and which could be handled by Commission staff. His view was expressed as follows:⁹

There is a means test in many of these areas and we would like to think that we have the training and the knowledge to give what the Act says we should give in all circumstances. I would feel badly about removing this from Commissioner responsibility.

I think some of these signatures that Mr. Power is speaking of, these education cases and so on, might be handled another way. That is an almost automatic thing. But of those claims that are reviewed, I repeat that I would say that they should come before Commissioners. It takes a lot of time. I have worked out that it takes approximately one-fifth of the time of the Commissioner's day to handle these cases - that is, making decisions and then signing the ones that were made yesterday. I may be out a little, but that is about it.

Mr. T.D. Anderson, Chairman, Canadian Pension Commission:

Mr. Anderson, in his appearance before your Committee under date of June 20th, commented generally on the question of delegating authority to Commission staff. The following discussion took place:¹⁰

Mr. Justice Woods: Now, the next is routine decisions. It would appear that, in the daily board meeting of the Commission, the time of Commissioners is taken up partly in dealing with what appears to be routine decisions, and in using that term we are not playing down the importance of them, but, for example, burial grants.

Representations and Evidence

Would it not be feasible for the Commission, either with or without an amendment of the Act, to delegate some of this responsibility to properly trained administrative personnel either at Head Office or at the District Offices, such personnel to act on the basis of a manual or set of directives issued by the Commission?

You do some of this now?

Mr. Anderson: Yes.

Mr. Justice Woods: I think the question is: could it be extended to take the load off?

Mr. Anderson: Yes, I think you have chosen a very good section as an example, Section 35, to indicate just what the problem is.

I think I would like to point out that we have interpreted the phrase "estate not sufficient to pay expenses", and I think it was necessary to do so - for instance, one would normally decide if a funeral cost \$250 or \$500, whatever it might be, and there was that much left in the estate, that the widow would get nothing by way of a burial grant.

How we have attempted to do what we consider to be fair and just in regard to Section 35. For example, a man who dies leaving a widow a \$10,000 house and no cash, if we were to interpret the legislation strictly in accordance with what it says here, I suggest to you we would not be able to give her a grant and she would therefore probably have to sell her house in order to pay funeral expenses.

Therefore, first of all, we have exempted the house. We say that will not be considered, and then beyond that, depending on whether or not she is entitled to pension, we grant certain other amounts - \$6,000 I believe is the amount we let her have - \$5,000 is the amount we let her have before we say she has more money than is needed to pay for the funeral.

Mr. Justice Woods: That is presently?

Mr. Anderson: Yes. When you get into this sort of thing you see why it is necessary for the Commissioners themselves to deal with this sort of decision. I daresay you could lay down these fixed rules and regulations and turn them over to somebody in the claims branch and say, "Here, you go ahead and authorize this, if you like" - I should say first of all we couldn't do that at the present moment under the Act, but these are the problems that arise in connection with a lot of the angles that do not appear evident from the legislation, and this is why we feel that they must be dealt with by the Commission.

Representations and Evidence

There may be some in the category to which you refer: there are some where we have done what is suggested.

Mr. Justice Woods: If you lay down a specific set of rules dealing with specific instances --

Mr. Anderson: Yes.

Mr. Justice Woods: And say only those that fall squarely within those would be dealt with administratively and the rest would be passed on ---

Mr. Anderson: Yes. This is what we do with educational extension benefits, and it works very well.

Mr. Justice Woods: Yes.

Mr. Anderson: I would agree there might well be certain types of claims which we could deal with on that basis to a greater extent than we are now.

Mr. Justice Woods: I think the Committee appreciates, as I am sure the Commission feels that the importance of the problem is not directly related to the amount of money that is involved in it particularly in a pension matter, but there was some suggestion on what you might call a casual glance that the Commission was dealing with a substantial number of relatively small matters - of course we are not in a position to know whether these could be categorized in a way that would allow them to be handled fairly by some straight administrative process rather than on a semi-judicial basis as you are handling them now.

Mr. Anderson: As I say, there are a number that we have already done that with, and we are watching this situation.

There is one, I think, serious aspect of this thing that the Commission must always bear in mind: we are dealing with human beings. We are expected to deal with them on the basis of what is just and proper and right.

Now, to stereotype any of this and set it down in figures and say regardless of who this person is or what they are, thus and so will be done, this leaves you open to not only criticism but I think perhaps to doing things that are not quite as just and proper as they should be.

The Commission feel they should look at this and do what is right by the individual. The legislation itself leaves us scope to do it, and we should be sure that we do.

COMMITTEE RECOMMENDATIONS

(48) That authority be delegated to Senior Pension Medical Examiners in the district offices of the Pension Commission to adjudicate upon initial applications, relating to last illness, funeral and burial expenses under Section 35 of the Act.

SPME to decide
last illness
and burial
grants

(49) That authority be delegated to Senior Pension Medical Examiners to adjudicate upon all matters relating to the administration of pension for the benefit of the pensioner or dependants, as provided under Section 18, with the exception of cases where the pensioner is not maintaining his dependant to whom he owes the duty of maintenance.

SPME to ad-
judicate
administered
awards except
split pension

(50) That authority be delegated to Senior Pension Medical Examiners to adjudicate applications for additional pension on behalf of wives and children where there is no question concerning the validity of the marriage or the relationship of the children to the pensioner.

SPME to
approve
additional
pension

(51) That authority be delegated to the Senior Pension Medical Examiners to adjudicate upon all matters under Section 71 of the Act wherein a municipal or provincial government agency may be recouped from a retroactive award of pension for assistance given to the pensioner during such period.

SPME to Re-
coup Municipa
or Provincial
Government
Agency for
Assistance
Given to
Pensioner

Committee Recommendations

(52) That authority be delegated to Senior Pension Medical Examiners to review and approve continuation of awards of discretionary benefits under the Act, subject to pension law directives to be issued from time to time by the Pension Commission, in the matter of:

SPME to
approve
continuation
on review

(a) pension paid on a split basis where a member of the forces is deemed not to be maintaining the members of his family to whom he owes the duty of maintenance, in accordance with Section 18 of the Act.

Split
pension

(b) additional pension extended beyond statutory age limit on behalf of a physically or mentally infirm child under Section 26(1)(a).

Infirm
Child

(c) pension to or in respect of child entitled to be maintained by member of forces in respect of whom pension is claimed or child given in adoption or placed by competent authority under Section 26(4)(5)(6).

Pension
for child
under certain
circumstances

(d) additional pension for person in lieu of wife who assumes household duties and care of children, continued as long as there are minor children under Section 26(9).

Pension
continued
on death
of wife

(e) pension for person in lieu of widow who assumes household duties and care of children continued as long as there are minor children under Section 26(10).

Pension
continued
on death
of widow

(f) pension to person who assumes household duties and care of children, at rate not exceeding that of widow under Schedule "B", on death of member of forces who was a widower, as long as pension on behalf of minor children continues to be paid under Section 26(10a).

Pension on
death of wi-
dower paid as
long as there
are minor
children re-
ceiving pension

(g) additional pension for wife not living with or being maintained by married member of forces may be awarded under Section 31(1)(2).

Payment to
wife under
certain con-
ditions

(h) additional pension for parents or persons in place of parent may be awarded under Section 34(3)(1).

Allowance for
maintenance of
parents

Committee Recommendations

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| (i) pension being paid to a widow on a discretionary basis under Section 36(4) (5) (6). | <u>Discretionary pension to widows</u> |
| (j) pension paid to a dependent parent under Section 38. | <u>Parent</u> |
| (k) pension paid to a dependent sister or brother under Section 39. | <u>Brother</u>
<u>Sister</u> |
| (l) pension which has been restored to a remarried widow under Section 45(2). | <u>Remarried</u>
<u>Widows</u> |
| (53) That authority be delegated to officials of the Claims and Review Branch at the head office of the Pension Commission to adjudicate upon initial applications relating to the award of discretionary benefits under the Act, in regard to: | <u>Claims and Review Branch Awards</u> |
| (a) suspension of pension when pensioner has been sentenced to imprisonment for six months or more and pension is paid at single rate under Section 19. | <u>Pension at single rate suspended</u> |
| (b) discontinuation of pension following death of pensioner under Section 24(1a)(a)(b)(c)(d)(e). | <u>When pension payments cease</u> |
| (c) payment to a pensioner of an instalment of his pension that has remained unclaimed for more than two years under Section 24(2), up to \$500. | <u>Unclaimed Instalments</u> |
| (d) approval of power of attorney given by a pensioner to a third party in accordance with Section 24(3) | <u>Power of Attorney</u> |
| (e) disposal of unpaid balances in accordance with Section 24(4) by payment to a widow, an estate, or by re-crediting to an account where a pensioner has died and there are no dependants within the meaning of the Pension Act. | <u>Unpaid balance</u> |
| (f) additional pension extended beyond statutory age limit on behalf of a physically or mentally infirm child under Section 26(1)(a). | <u>Infirm Child</u> |

Committee Recommendations

- (g) extension of pension for a child in accordance with Section 26(1)(b) where the child is undergoing a course of instruction, such decision to be made in regard to both first and all succeeding extension provided for in the Act. Extension for Child in Training
- (h) additional pension for child in accordance with Section 26(3). Adopted Child
- (i) continuation of pension under Section 26(7) to children of a pensioner who has died, and at the time of his death was in receipt of a pension in any one of the classes from 1 to 11 inclusive, mentioned in Schedule A, or who died while on the strength of the department for treatment and but for his death would have been in receipt of pension in one of the set classes. Extension - Child of pensioner Classes 1 to 11
- (j) approval for payment of bonus as provided in Section 26(8) of the Pension Act that the children of a deceased pensioner under conditions that do not entitle his dependants to pension, provided that the claim does not require decision as to whether or not the death was attributable to service. Bonus
- (k) approval of additional pension for a married member of the Forces on or after the death of the pensioner's wife, in accordance with Section 26(9) of the Act, so long as there is a minor child or there are minor children in respect of whom additional pension is being paid, if there exists a daughter or other person competent to assume or who does assume the household duties and care of such child or children. Married Allowance to daughter, etc.
- (l) continuation of pension under Section 26(10), on or after the death of a widow of a member of the Forces who has been in receipt of pension, so long as there is a minor child or there are other minor children to or in respect of whom a pension is being paid, such to be payable to a daughter or other persons competent to assume and who does assume the household duties and care of the other children. Widow's pension to daughter, etc.

Committee Recommendations

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| <p>(m) continuation of pension in accordance with Section 26(10a) of the Act where such has been awarded to a minor child or minor children of a member of the Forces who at the time of his death, was a widower and who, during his lifetime, maintained a domestic establishment for such child or children, such pension not to exceed the rate provided in Schedule B of the Act for a widow, to be paid to a daughter or other person competent to assume, and who does assume the household duties and care of such child or children, until such time as the pension has been discontinued in respect of all of the minor children.</p> | <p><u>Married</u>
<u>Pension to</u>
<u>daughter, etc.</u></p> |
| <p>(n) pension to or in respect of a child or children of a female member of the Forces, in accordance with Section 26(11) of the Act.</p> | <p><u>Child of</u>
<u>female</u>
<u>pensioner</u></p> |
| <p>(o) pension to widow of member of the Forces whose death is attributable to service or pensionable disability, who was living with and being maintained by the member of the Forces at the time of his death, under Section 36(1).</p> | <p><u>Pension to</u>
<u>Widow where</u>
<u>Death is</u>
<u>attributable to</u>
<u>service or</u>
<u>pensionable</u>
<u>disability</u></p> |
| <p>(p) pension to widow of member of the Forces who at the time of his death was in receipt of pension in any of the classes one to eleven inclusive under Section 36(3).</p> | <p><u>Pension to</u>
<u>widow of</u>
<u>pensioner</u>
<u>Classes 1 to 11</u></p> |
| <p>(q) approval of payment of re-marriage gratuity under Section 45(1).</p> | <p><u>Re-marriage</u>
<u>gratuity</u></p> |
| <p>(r) determining domiciliary status of members of British Commonwealth and Allied Forces for supplementary pension benefit under Sections 50, 51, 52, 53 and 54.</p> | <p><u>Domiciliary</u>
<u>status of</u>
<u>members of</u>
<u>British and</u>
<u>Allied Forces</u></p> |
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- (54) That authority be delegated to officials of the Claims and Review Branch to adjudicate upon all matters relating to the discontinuation of the payment of pension as follows:

Claims and
Review Branch
Discontinuations

Committee Recommendations

- | | | |
|-----|---|--------------------------------------|
| (a) | in respect of a child after its marriage as provided in Section 26(2). | <u>Child on Marriage</u> |
| (b) | in respect of a brother or sister after the marriage of such brother or sister, as provided in section 39(4). | <u>Brother or Sister on Marriage</u> |
| (c) | to a widow on notification of her re-marriage as provided in Section 45(1). | <u>Widow on Re-marriage</u> |
- (55) That authority be delegated to officials of the Claims and Review Branch to adjudicate upon all matters relating to the increase or decrease (but not suspension or cancellation) subject to pension law directives to be issued from time to time by the Pension Commission in regard to:
- | | | |
|-----|--|------------------------|
| (a) | Pension paid to a dependent parent under Section 38(d). | <u>Parent</u> |
| (b) | Pension paid to a dependent sister or brother under Section 39. | <u>Brother; Sister</u> |
| (c) | Pension extended beyond statutory age limit on behalf of a physically or mentally infirm child under Section 39(5). | <u>Child</u> |
| (d) | Pension paid on a split basis where a member is deemed not to be maintaining the members of his family to whom he owes the duty of maintenance in accordance with Section 18 of the Act. | <u>Split Pension</u> |
- (56) That authority be delegated to officials of the Claims and Review Branch to make decisions:
- | | | |
|-----|---|--------------------------------|
| (a) | To authorize deductions from future payments of pension where an overpayment has been made. | <u>Recovery of Overpayment</u> |
| (b) | To recommend deletion of an overpayment where recovery from the pensioner cannot be made. | <u>Deletion of Overpayment</u> |

Committee Recommendations

- (57) That, where necessary, the Act be amended to allow the Commission to delegate the power necessary to effectuate the foregoing recommendations concerning routine decisions.
- (58) That the Commission institute a quality control procedure designed to review and evaluate the quality of the decisions made by the Senior Pension Medical Examiners and the officials of the Claims and Review Branch at the head office of the Commission.
- (59) That a recruiting and staff development policy be undertaken to ensure that the Claims and Review Branch has sufficient personnel and capability to adjudicate on the routine decisions of the Commission, as devised in these recommendations.
- (60) That an adjudicating authority be established within the Claims and Review Branch, under the chairmanship of the Chief of the Branch, augmented by suitable personnel, to have responsibility for adjudication as outlined in these recommendations; and that:
- (a) this adjudicating authority have access to legal advice through the pension counsel or the legal adviser of the Department of Veterans Affairs, and to professional advice on social welfare problems through the Director, Social Welfare, Department of Veterans Affairs; and
- (b) this adjudicating authority be permitted to refer cases to the Commission for advice or adjudication as required.

Quality Control
of Decisions
of SPME's and
Claims and
Review Branch

Claims and Review
Branch to
Recruit and
Develop Staff

Adjudicating
Authority

Legal and
Social
Welfare
Adviser

Referral to
Commission

COMMENT

Your Committee observed that the Commissioners were required, either by the Act or by policy, to make the decisions in practically all areas where Commission discretion is involved, including those which could be considered as routine in nature. The Commission had delegated authority to officials of the Commission's Claims and Review Branch for the approval of payment of the initial application for additional pension for dependants, for recovery of overpayment up to \$50 and for the approval of second and subsequent extensions of pension for children undergoing course of instruction. Notwithstanding this delegation of authority, it was apparent that Commission policy was to reserve for quorum decisions of the Commission, a number of other areas which might well be delegated.

Your Committee took note of the administration of the War Veterans Allowance Act within the Department of Veterans Affairs, under which authority for awards is the initial responsibility of departmental staff in the district offices. The War Veterans Allowance Board reserved to itself the responsibility to resolve disputed claims and to decide upon and promulgate policy directives. Your Committee as such made no study of other administrations, but is aware that in many jurisdictions similar to that of the Pension Commission, the responsibility for decisions in routine areas is delegated either to district staff or to qualified administrative staff at Ottawa, operating under the direction of the governing body.

A pre-requisite to the delegation of authority is the publication of policy directives for the guidance of those to whom decision powers are delegated. Your Committee has recommended * that the Pension Commission

* See Recommendation No. 96, Volume III, Chapter 23, page 852

Comment

issue directives and administrative instructions in all areas of pension administration, including those involving discretionary benefits under the Act. If this is done the Pension Commission staff at the head office of the Commission and in the district offices could approve benefits within the policies laid down by the Commission.

This delegation would leave with the Commission the responsibility for initial awards in those areas where, in the view of your Committee, the exercise of discretion in more controversial areas is required. At the same time, your Committee is of the view that considerable use can be made of senior staff members of the Commission in the districts and at head office, thus relieving the Commissioners of responsibility for what appear to be routine decisions. Appendix I to this Section sets out the discretionary areas and shows, in chart form, the recommendations of your Committee concerning the decisions which might be made by the Pension Commission, the Claims and Review Branch, and the district offices, through the Senior Pension Medical Examiner who is the officer responsible for administration.

Your Committee's recommendation is that authority should be delegated to the Senior Pension Medical Examiners in the districts or to officials of the Claims and Review Branch not only to approve, but also in some circumstances to refuse an application for a discretionary benefit. With respect to the district offices, this applies to administration of pensions under Section 18 and applications for last illness, funeral and burial expenses under Section 35. In regard to the Claims and Review Branch, this applies to a number of routine matters as set out in Appendix I to this Section.

Comment

The proposal that the powers of approval and refusal should be delegated to the district offices and the Claims and Review Branch is based on the premise that your Committee's recommendation concerning an application procedure for discretionary benefits will be accepted.

The recommendations in this regard are set out in Section II, Item 7 - Application Procedure. Briefly, the proposal is that applications for discretionary benefits would be processed through first, second and renewal applications with provision, under certain circumstances, for an appeal by way of a personal appearance before one or more members of the Commission, with further provision for re-consideration before a proposed Pension Appeal Board. It is evident, therefore, that should a decision by a district office or the Claims and Review Branch be unacceptable, an applicant would have access to a procedure which involves a review of the application by the Commission, with a further appeal outside of the Commission if necessary.

It will be noted that your Committee's recommendation concerning delegation of powers of adjudication relates only to first applications. Where a first application does not succeed and an applicant desires to proceed to a second application or subsequent procedures, the adjudication would be the responsibility of the Commission.

This delegation of powers should relieve some of the congestion which presumably results from the fact that individual Commissioners, sitting in quorums of two or more, are required to make practically all decisions involved in the administration of the Pension Act. Your Committee considers that it is necessary to relieve the Commissioners of some of this routine responsibility, thus permitting them to spend more time on

Comment

the adjudication of entitlement claims and on hearings. This latter responsibility may increase if the recommendations of your Committee are accepted in regard to an expansion of personal appearances under Section 7(3) of the Pension Act, and if the responsibilities of the individual Commissioner in regard to Entitlement Boards are expanded in accordance with your Committee's recommendations.

The Methods and Inspection Division of the Department of Veterans Affairs carried out a study of the systems and procedures in the Claims and Review Branch in September, 1964. The interim recommendations made as the result of this study were viewed by your Committee. Those which dealt with the delegation of authority were as follows: "

1. The Commission delegate authority to the Pensions Medical Examiner and the Administrative Officer (Pensions) in the district office to authorize additional pension on behalf of wives and children in all cases that do not involve questions concerning the validity of the marriage, or the relationship of the children of the pensioner.
2. The Commission delegate authority to the Claims and Review Branch on behalf of widows who remarry and to approve payment of the remarriage gratuity.
3. The Commission delegate authority to the Claims and Review Branch to approve payment of the one year bonus to children who are not entitled to pension on the death of a pensioner.

Comment

These recommendations have been incorporated into those being made herein by your Committee.

District Staff

The Canadian Pension Commission employs a Senior Pension Medical Examiner in fifteen of its eighteen district offices in Canada. In the remaining three district offices (North Bay, Ontario, St. John's, Nfld., and Charlottetown, P.E.I.) the Senior Pension Medical Examiner acts also as the Senior Treatment Medical Officer of the Department of Veterans Affairs. The Commission employs administrative officers or supervising clerks or principal clerks in the districts, all of whom should be capable of handling, together with the Senior Pension Medical Examiner, the responsibility for decisions as proposed in your Committee's recommendations. When a Senior Pension Medical Examiner is absent, and there is no other pension medical examiner to approve a decision in an urgent case, the matter could be referred to the head office of the Commission for decision.

Claims and Review Branch

Your Committee noted that the Claims and Review Branch is staffed with personnel who have a thorough knowledge of the Pension Act, and are well versed in social welfare and other related fields. This staff, under existing practice, has the responsibility to prepare decisions for consideration of individual Commissioners. Provided that the policies of the Commission were laid down in directives, and that proper supervision was instituted, this staff should, in the view of your Committee, be able to accept responsibility for decisions in the areas as recommended.

Comment

Your Committee has put forward the recommendation * that the Commission should institute a system to ensure quality control in the decisions it suggests should be made by the Senior Pension Medical Examiners, and by officials of the Claims and Review Branch. A system of this type would presumably be under the direct supervision of the Chairman of the Commission, who would make use of the services of individual Commissioners to assist in the screening of decisions. This form of quality control would achieve standardization and would form the basis of a staff training programme, designed to establish and maintain proper standards of adjudication at the levels below that of the Commissioners. This would require only a fraction of the time now taken up by adjudication of routine matters by Commissioners.

Final Authority to Remain with Commission

Your Committee's recommendation concerning delegation of powers to the Senior Pension Medical Examiners and the Claims and Review Branch at head office is made on the premise that the ultimate responsibility for these decisions must rest with the Commission. Accordingly, it is considered that the Commission must keep under review the decisions made by delegated authority, and must have the power to reverse these decisions, and to revoke delegated powers if necessary.

Administrative Economy

Although your Committee has no expertise in the matter of systems management, it seems apparent that the utilization of district office staff to make decisions in a number of areas as recommended herein would result in a saving of administrative expense.

* See Recommendation No. 58 on page 421 hereof.

Comment

Under existing practice, these cases are usually prepared in a district office, forwarded to the Claims and Review Branch at head office, and then submitted to a quorum of commissioners for decision. In the procedure as envisaged by your Committee, the Senior Pension Medical Examiner could view the result of the investigation by the district officials and make the decision, passing the necessary instructions to the district treasury office for local action or for action through the Chief Treasury Officer in Ottawa, where required. This is in effect what is done at present, except that the decision is made by the Commission in Ottawa on the basis of the information supplied by the Senior Pension Medical Examiner..

A saving would be effected also through an expanded use of officials of the Claims and Review Branch. At present, these officials prepare a large volume of routine cases for decision by individual quorums of Commissioners. If these administrative officials are allowed to make the decisions, a reduction in paper work, and a corresponding reduction in administrative costs should result. For example, the practice now followed is for the Claims and Review Branch to prepare a summary of a recommendation for consideration of the Commission. The file is then reviewed by a quorum of Commissioners, who certify the decision. It is then returned to the Claims and Review Branch where the decision is typed onto the form and the file is again returned to the Commission for signature of a quorum of Commissioners.

The recommendations of your Committee in regard to the making of decisions at the district and head office levels, in place of the existing procedures which require decisions by quorums of individual Commissioners, should reduce delays and decrease the volume of departmental files in the board room of the Commission in Ottawa.

CommentRecruiting and Training for Staff

Your Committee reviewed the work of the officials of this branch and concluded that they are performing in a useful and efficient manner. However, considerable upgrading in their positions, together with some augmentation by new staff and an imaginative training programme is desirable.

Adjudicating Authority

It is proposed herein that an adjudicating authority be established within the Claims and Review Branch under the chairmanship of the Chief of the branch. This adjudicating authority could review cases prepared by the sections within the branch, on a "daily meeting" basis if necessary. The members comprising this authority should be vested with power to decide upon matters that have been delegated to them. In view of the considerable amount of legal and social welfare involvement in the work of the branch, your Committee has recommended that the branch officers have access to professional advice, as required.

SUBJECT MATTER	SECTION OF ACT	CANADIAN PENSION COMMISSION	CLAIMS AND REVIEW BRANCH	SENIOR PENSION MEDICAL EXAMINER
1. Additional pension for wife and children where validity of marriage or relationship of children is not questionable				Adjudication
2. Additional pension for wife and children where validity of marriage or relationship of children is questionable		Adjudication		
3. Administration of pension	18			Adjudication
4. Administration of pension where pension is paid on split basis.	18	Adjudication	Adjustment following review by S.P.M.E.	Review & continue if no change
5. Suspension of pension on imprisonment where there are no dependents.	19		Adjudication	
6. Suspension of pension on imprisonment where there are dependents	19	Adjudication		
7. Discontinuation of pension following death of pensioner	24(1a)		Adjudication	
8. Unclaimed instalments of pension	24(2)	Adjudication over \$400.	Adjudication up to \$500.	
9. Power of Attorney given by pensioner to third party	24(3)		Adjudication	
10. Unpaid balance of pension	24(4)(5)		Adjudication	
11. Recovery of pension overpayment	24(7)		Adjudication	
12. Cancellation of debts (overpayments) for deletion			Adjudication	
13. Continuative pension	25	Adjudication		
14. Extension of pension for physically or mentally infirm child.	25(1)(a)		Adjudication	Review & continue if no change
15. Extension of pension for child receiving higher education	25(1)(b)		Adjudication	

Recommended Division of Adjudication Authority

Appendix I (cont'd)

PROVISION	SECTION	CANADIAN PENSION CLASSIFICATION	GRADE AND REVIEW BRANCH	REVIEW PERIOD (MONTHS)
16. Discontinuation of pension for child on marriage	25(2) 25(3)		Adjudication	
17. Additional pension for adopted child	26(3)		Adjudication	
18. Additional pension for child entitled to be maintained by pensioner	26(4)(a)	Adjudication		Review & continue if no change
19. Pension for child not living with pensioner	26(4)(b)	Adjudication		Review & continue if no change
20. Pension for children of deceased classes one to eleven pensioner	26(7)		Adjudication	
21. Pension for child of deceased pensioner	26(8)		Adjudication	
22. Pension for person in class of widow	26(9)		Adjudication	Review & continue if no change
23. Pension for person in class of widow	26(10)		Adjudication	Review & continue if no change
24. Pension for person assuming care of children and pensioner	26(11a)		Adjudication	Review & continue if no change
25. Pension for person in class of widow pensioner	26(12)		Adjudication	
26. Retroactive award of pension	31(2)(3) 31(3)(4)	Adjudication		
27. Pension for wife not living with pensioner	31(4)(5)	Adjudication		Review & continue if no change
28. Pension for person to whom pension is paid in place of person	31(7)(8)	Adjudication		Review & continue if no change
29. Additional pension for woman living with but not married to pensioner	34(5)	Adjudication		
30. Pension for woman deemed to be widow of pensioner	34(5)	Adjudication		

Recommended Division of Adjudication Authority

Appendix I (cont'd)

SUBJECT MATTER	SECTION OF ACT	CANADIAN PENSION COMMISSION	CLASIS AND REVIEW BRANCH	SENIOR PENSION MEDICAL EXAMINER
31. Lost illness, funeral and burial grants	35			Adjudication
32. Widow's pension	36(1)		Adjudication	
33. Widow's pension	36(3)		Adjudication	
34. Widow's pension	36(4)(5)(6)	Adjudication		Review & continue if no change
35. Widow's pension	37(1)	Adjudication		
36. Pension for dependent parents or person in place of parent	38	Adjudication (initial)	Increase, decrease or discontinuance	Review & continue if no change
37. Pension for dependent brother or sister	39	Adjudication (initial)	Increase, decrease or discontinuance	Review & continue if no change
38. Appointer of pension to several applicants	41	Adjudication		
39. Suspension, discontinuation, cancellation or re-instate- ment of pensioner's pension in certain cases	44(1)(2)	Adjudication		
40. Discontinuation of pension for mother or widow on re-marriage	45(1)		Adjudication	
41. Payment of retroactive gratuity	45(1)		Adjudication	
42. Discontinuation of pension for widow, discontinued under Section 45(1) in certain cases	45(2)	Adjudication		
43. Discontinuation of pension on fraud, false representations or other grounds	46, 47 48, 49	Adjudication		
44. Discontinuation of disability status for supplementary pension	50, 51, 52 53 and 54		Adjudication	
45. Recoupment from retroactive award of pension to contributory or Provincial government agencies for aid given pensioner	71			Adjudication

ROUTINE DECISIONS
DISCRETIONARY BENEFITS

REFERENCES

1. Proceedings of Committee Sessions, Volume V, Page CC-6.
2. Ibid, Volume III, Page L-75.
3. Ibid, Volume V, Page CC-6.
4. Ibid, Volume V, Page CC-15.
5. Ibid, Volume V, Page CC-19.
6. Ibid, Volume V, Page CC-20.
7. Ibid, Volume VII, Page MM-41.
8. Ibid, Volume VII, Page MM-43.
9. Ibid, Volume VII, Page MM-43.
10. Ibid, Volume VII, Page NN-27.
11. Report on a Study of Systems and Procedures in Claims and Review Branch, Canadian Pension Commission, Project No. 42, September 1964, Page 45.

